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ABSTRACT

The U.S. Civil Rights Commission has undertaken the Equal Educational Opportunity Project to develop a series of six reports focusing on the opportunities available to students in American public elementary and secondary education. This first volume in the series evaluates and analyzes the history, performance, regulations, policies, and activities of the Office for Civil Rights (OCR) to set the stage for the later reports. Sections discuss the evolution of the Federal role in education and the programs of the U.S. Department of Education. National educational trends and the civil rights enforcement efforts of the Department of Education are profiled. This volume provides findings and recommendations on OCR's implementation, compliance, and enforcement efforts related to the four focus areas of: (1) ability grouping and the tracking of students; (2) development of individualized education programs for and placement of students classified as educable mentally retarded, students with learning disabilities, students with behavioral disabilities, and students with serious emotional disturbances; (3) development of programs for and placement of students of limited English proficiency; and (4) equal access for female students to advanced mathematics and science courses. Volumes II through V of the series will focus on each of these issues, and the sixth, and final report will present profiles of five school districts, focusing on education and civil rights issues. (Contains 2 figures and 43 tables.) (SLD)

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ED 406 472

Equal Educational Opportunity Project Series

Volume I

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December 1996

A Report of the United States Commission on Civil Rights

U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices;
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin;
- Submit reports, findings, and recommendations to the President and Congress;
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

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Equal Educational Opportunity Project Series

Volume I

December 1996

A Report of the United States Commission on Civil Rights

Letter of Transmittal

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

The United States Commission on Civil Rights (Commission) transmits this report, *Equal Educational Opportunity Project Series, Volume I,* to you pursuant to P.L. 103-419.

This report is the result of the Commission's long-standing commitment to ensuring that the Nation's public schools are free of discrimination and that all children in this country are afforded equal educational opportunity. The purpose of the series of reports of which this is the first is to evaluate the efforts of the U.S. Department of Education and its Office for Civil Rights (OCR) to enforce three primary statutes mandating equal educational opportunity: Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Section 504 of the Rehabilitation Act of 1973.

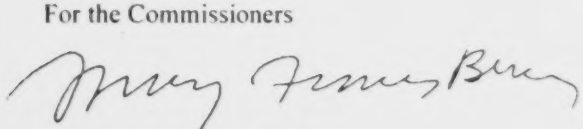
The Commission's report focused on OCR's enforcement of civil rights laws as it relates to four areas: (1) ability grouping and tracking of students; (2) development of individualized education programs for and placement of students classified as educable mentally retarded, students with learning disabilities, students with behavioral disabilities, and students with serious emotional disturbance; (3) development of education programs for and placement of students with limited English proficiency; and (4) equal access for female students to advanced mathematics and science courses. These issues extend beyond the traditional civil rights issues of interdistrict and intra-district school desegregation and permit the Commission to examine, within the context of educational practices, some of the present-day barriers and inequities that may prevent students from having an equal opportunity to participate in education programs, to maximize their learning potential, and to enhance their educational and career opportunities.

This first volume in the Equal Educational Opportunity Project Series evaluates and analyzes the OCR's history, performance, regulations, policies, and activities, setting the stage for the remaining reports. It provides findings and recommendations on OCR's implementation, compliance, and enforcement efforts relating to the four focus issues in public elementary and secondary schools. The Commission finds that, in general, OCR operates a highly developed civil rights implementation, compliance, and enforcement program that should serve as a model for other civil rights agencies. However, the report contains specific recommendations for further improving and strengthening OCR's civil rights enforcement operations.

For nondiscrimination and equal educational opportunity to be assured in our Nation's public schools, it is essential that the Department of Education work hand in hand with school administrators, teachers, students, parents, and the community at large. The Commission's intention, with this report, is to assist the Department of Education in its efforts to strengthen its partnership with all of these groups and thereby enhance the Department's civil rights enforcement program.

Respectfully,

For the Commissioners



MARY FRANCES BERRY
Chairperson

Acknowledgments

This report was prepared under the direction and supervision of Frederick D. Isler, Assistant Staff Director for Civil Rights Evaluation. The report was written by the staff of the Office for Civil Rights Evaluation, including Andrea Baird, Social Scientist; David Chambers, Civil Rights Analyst; John Dill, Supervisory Civil Rights Analyst; Wanda Johnson, Civil Rights Analyst; Eric Mann, Civil Rights Analyst; Christine Plagata-Neubauer, Civil Rights Analyst; Tami Trost, Civil Rights Analyst; and Nadja Zalokar, Supervisory Civil Rights Analyst. OCRE staff also was assisted by Jeanette Johnson, intern. Eileen Rudert produced enforcement tables for this report. The legal review was performed by Stephanie Moore, Edward Hailes, Jr., and Lillian Moyano-Yob. Editorial review was provided by James Cunningham, Edward Darden, Gerri Mason Hall, and Charles Rivera. Latrice D. Fosheé provided administrative support for the project. Gloria Hong Izumi supervised the production of the report.

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Chapter 1

Introduction

Throughout the history of our nation, Americans have considered education a fundamental ingredient of a democratic society. There have been a variety of schools over time, both public and private, and Americans have always viewed education as a means of providing opportunities for children from varying social and economic backgrounds. American public schools have served diverse communities, and have functioned not only to accommodate that diversity, but also to promote a common understanding of American culture.

It was not until 1954, however, that the obligation arose to afford equal educational opportunity for all students in American public education. In that year, the U.S. Supreme Court, in its landmark decision in *Brown v. Board of Education*,[1] ruled that *de jure* segregation of public education based on race deprived black children of equal educational opportunity in violation of the equal protection clause of the 14th amendment. The *Brown* decision provided some understanding of the concept of equal educational opportunity,[2] and it has been the widely acknowledged catalyst for subsequent civil rights laws and policies mandated to address the educational rights of other disenfranchised groups such as female students, students with disabilities, and students for whom English is not their first language.

Over 40 years have passed since the *Brown* decision. Yet the goal of equal opportunity for a quality education remains to be met. There is evidence that education as measured by achievement levels still leave a lot to be desired for some children. This report discusses the Federal enforcement effort to ensure equal educational opportunity for all.[3]

The U.S. Commission on Civil Rights (Commission) has long sought to address the problems associated with achieving the goals of equal educational opportunity for all students who participate in the American public education system. In fact, since the Commission's inception in 1957, its publication record on educational topics has included scores of statutory reports, clearinghouse publications, hearings, consultations, and staff reports.[4] A listing of titles of Commission publications illustrates the many educational issues the Commission has addressed. The Commission's reports on American public education include: *Racial Isolation in the Public Schools* (1967); *School Desegregation in Ten Communities* (1973); *Twenty Years After Brown* (1975); and *With All Deliberate Speed: 1954–19??* (1981). In addition to these reports, the Commission's State Advisory Committees have published reports, representing virtually every State, on critical education issues. For example, in 1991, the North Carolina Advisory Committee issued, *In-School Desegregation in North Carolina Public Schools*. These reports have focused on such areas as school desegregation, busing, and civil rights enforcement and compliance activity.

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[1] 347 U.S. 483 (1954) (Brown I).

[2] The Court in *Brown* noted that although many of the "tangible" factors in education, such as buildings, curricula, teacher qualifications and salaries, had been "equalized" among black and white students, a separate education was not equal. 347 U.S. at 492–93.

The *Brown* decision implies that equal educational opportunity involves more than the provision of equal facilities, class curricula, resources, teachers, and other tangible factors. Since *Brown*, there have been many attempts to identify the meaning of equal educational opportunity. *See generally* James S. Coleman, *Equality and Achievement in Education* (Boulder, CO: Westview Press, 1990); Michael A. Rebell and Arthur R. Block, *Equality and Education: Federal Civil Rights Enforcement in the New York City School System* (Princeton, NJ: Princeton University Press, 1985); Gwendolyn Mikell Remy and Emerson J. Elliott, *Brown v. Board of Education: 25 Years Toward Equal Educational Opportunity* (Washington, DC: The George Washington University institute for Educational Leadership, February 1979); Kenneth S. Tollet, "The Propriety of the Federal Role in Expanding Equal Educational Opportunity," *Harvard Educational Review*, vol. 52, no. 4 (November 1982), pp. 431–43; Judith A. Winston, "Equality, Diversity and Opportunity: Civil Rights and Affirmative Action in the 1990s," *The Journal of Intergroup Relations*, vol. 18, no. 2 (Summer 1991), pp. 22–42; Martha M. McCarthy, "Is the Equal Protection Clause Still a Viable Tool for Effecting Educational Reform," *Journal of Law & Education*, vol. 6, no. 2 (April 1977), pp. 159–82; James S. Coleman, "What Constitutes Educational Opportunity," *Oxford Review of Education*, vol. 17, no. 2 (1991), pp. 155–59; William L. Taylor, *The Continuing Struggle for Equal Educational Opportunity*, 71 N.C. L. REV. 1693 (1993); Robert L. Woodson, *Race and Economic Opportunity*, 42 VAND. L. REV. 1003 (1989); Mark G. Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411 (March 1973). Neither, the U.S. Department of Education nor its Office for Civil Rights have issued a formal definition for the term.

[3] As this report examines the Federal role in achieving equal educational opportunity, it does not address social problems and issues of familial relations and values which many people believe are beyond the reach of school systems.

[4] *See* U.S. Commission on Civil Rights, *Catalog of Publications* (Washington, DC: U.S. Commission on Civil Rights, June 1996); U.S. Commission on Civil Rights, *Out of Print Publications* (Washington, DC: U.S. Commission on Civil Rights, 1996).

The Commission issued its 1967 report, *Racial Isolation in the Public Schools*, in response to a request by President Lyndon B. Johnson that the Commission investigate whether, even with the end of formal segregation, racial isolation in education still existed. The President had expressed his concern that racial isolation in education still existed throughout the United States due to shifting housing patterns, school districting and redistricting, and economic stratification. The Commission conducted extensive research on school achievement and student attitudes, analyzed data on the effectiveness of various compensatory education programs, and examined the contemporary and potential future role of government in these areas. In its recommendations, the Commission suggested that the Federal Government should develop uniform standards for eliminating racial isolation, provide substantial financial assistance for new facilities to improve the quality of education, and develop legislation to eradicate discriminatory housing practices that promoted racial isolation.[5]

The Commission published a major report on school desegregation in 1973. The report *School Desegregation in Ten Communities*,[6] described an investigation into school desegregation in two types of communities: those in which desegregation had been effected only after being met with strong resistance and drawn-out litigation battles, and those in which schools were desegregated in an atmosphere of relative calm. The Commission made several major findings and recommendations based on this report. First, the Commission found that many people feared desegregation would result in a decrease in educational quality. Second, desegregation efforts tended to proceed successfully when communities were informed about the effects of the desegregation process. Third, school officials tended to consider the needs and desires of the white community while minimizing the concerns of the minority communities.[7] Finally, the Commission submitted that, although these findings reflected aspects of the desegregation process critical to an informed understanding of its dynamics, there existed no definitive prescription that would be relevant to all communities.

In 1981 the Commission's report *With All Deliberate Speed: 1954–19??* [8] provided a comprehensive review of the history of school desegregation. Beginning with the end of the Civil War and the Emancipation Proclamation, the report traced the evolution of judicial interpretations of the equal protection clause of the 14th amendment from the U.S. Supreme Court's enunciation of the "separate but equal' doctrine through the post-*Brown* era. The Commission analyzed school desegregation in both the North and South in light of the ongoing litigation occurring in many States. The Commission also presented a broad discussion of busing as a desegregation tool, and a discussion of various Federal initiatives in both the legislative and executive branches. Although this report did not generate many recommendations, it presented multiple perspectives about the importance of school desegregation in creating quality education for all Americans.[9]

The North Carolina State Advisory Committee published a report in 1991 entitled *In-School Segregation in North Carolina Public Schools*. Even with the progress of school desegregation, minority group parents in North Carolina reported another form of discrimination: the overrepresentation of minority students in remedial education programs. The North Carolina State Advisory Committee observed that minority students represented 58 percent of the students in classes for the educable and trainable mentally retarded although they accounted for only 31 percent of the total statewide school enrollment. The report relied on testimony from various educators to substantiate that inaccuracies in testing and assessment were resulting in gross inequities in placement. The report also indicated that State educational agencies had failed to collect appropriate data on this issue. In addition, the report presented detailed analyses of enrollment disparities reflecting the adverse impact of ability grouping practices on minority students. The report noted that minority students had disproportionately high enrollment in low-ability classes and underenrollment in classes for the gifted and talented. The report concluded that this practice presented significant civil rights issues requiring further study and investigation. In addition, the report emphasized the need for education policymakers, practitioners, and civil rights enforcement authorities to conduct monitoring and evaluations of school practices in order to more effectively provide equal educational opportunities for all students.[10]

These reports demonstrate that civil rights issues in American schools remain a national concern and continue

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[5]U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* (Washington, DC: Government Printing Office, 1967), pp. 209–12.

[6]U.S. Commission on Civil Rights, *School Desegregation in Ten Communities*, (Washington, DC: Government Printing Office, 1973).

[7]Ibid., pp. 2–13.

[8]U.S. Commission on Civil Rights, *With All Deliberate Speed: 1954–19??* (Washington, DC: Government Printing Office, 1981).

[9]Ibid.

[10]North Carolina Advisory Committee to the United States Commission on Civil Rights, *In-School Segregation in North Carolina Public Schools*, (Washington, DC: U.S. Commission on Civil Rights, 1991).

to reflect an area of critical importance for study and review. These reports also continue to help focus our efforts in eradicating discrimination and the denial of equal educational opportunity from our schools. In the more than 40 years since the *Brown* decision, efforts to ensure equality of educational opportunity have focused on the priorities of investigating and analyzing discrimination based on race, national origin, sex, and disability. The Commission intends, in the present series of reports, to examine the Federal equal educational enforcement effort.

Background

In the four decades following the *Brown* decision, a host of major legislative initiatives have sought to address the inequities faced by students in America's schools. Title VI of the Civil Rights Act of 1964 prohibits discrimination in public schools, and other federally assisted programs, on the basis of race, color, or national origin.[11] The Elementary and Secondary Education Act of 1965 created numerous financial assistance programs benefiting the economically disadvantaged, female students, students with limited English proficiency, and students with disabilities.[12] Title IX of the Education Amendments of 1972[13] and Section 504 of the Rehabilitation Act of 1973[14] created civil rights protection based on gender and disability, respectively. The Equal Educational Opportunities Act of 1974[15] created protection for individuals denied equal educational opportunity on the basis of race, color, sex, or national origin. The Education for All Handicapped Children Act of 1975, now called the Individuals with Disabilities Education Act, created substantive rights for, and Federal financial assistance programs benefiting, children and youth with disabilities.[16] Congress enacted these statutes to protect and improve the educational opportunities for groups who have experienced systemic discrimination in American society, including minorities, children with disabilities, students with limited English proficiency, and female students.

Despite the longstanding existence of civil rights protections and Federal education programs, however, barriers to the provision of equal educational opportunities continue to perpetuate invidious discrimination. Although the Supreme Court ordered public elementary and secondary schools to integrate "with all deliberate speed,"[17] over 40 years ago in *Brown v. Board of Education (Brown II)*, America's public schools are characterized by racial isolation.[18] As middle-class and upper class families have moved from urban to suburban settings, changes in demographic patterns have resulted in concentrations of poor minority students in many inner-city schools and middle-class minority students in suburban schools. Hence, students in urban and suburban schools are divided by race, ethnicity, and economic status.[19]

Even in school systems where racial and ethnic integration has been achieved, segregation exists on a different level—within the classroom. Placement of students by ability groups and program tracks and into special education and remedial education programs has perpetuated racial and ethnic divisions within schools.[20] Moreover, present-day segregation involves more than a division based on race, ethnicity, or socioeconomic level. For example, recent reports indicate that placement into regular education schools or classes is not an option for many students with disabilities.[21] Studies of enrollment patterns also reveal the difficulties faced by female and minority students in advanced mathematics and science classes.[22]

The Equal Educational Opportunity Project Series: Project Purpose

The Commission has undertaken the Equal Educational Opportunity Project to develop a series of six reports focusing on the opportunities available to students

[11]Pub. L. No. 88–352, 78 Stat. 252 (codified as amended at 20 U.S.C. §§ 2000d to 2000d-7 (1988)).

[12]Pub. L. No. 89–10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

[13]20 U.S.C. §§ 1681–1688 (1988).

[14]29 U.S.C. § 794 (1988 & Supp. V 1993).

[15]Pub. L. No. 93–380, 88 Stat. 515 (codified as amended in 20 U.S.C. §§ 1701–1714 (1988)).

[16]Pub. L. No. 94–142, 89 Stat. 775 (as amended), *renamed* The Individuals with Disabilities Education Act, Pub. L. No. 101–476, 104 Stat. 1143 (1990) (codified as amended in 20 U.S.C. §§ 1400–1485 (1988 & Supp. V 1993)).

[17]Brown v. Board of Educ., 349 U.S. 294, 301 (1955) (Brown II).

[18]Brown v. Board of Educ., 349 U.S. 294 (1955) (Brown II).

[19]*See* William L. Taylor, *The Continuing Struggle for Equal Educational Opportunity*, 71 N.C. L. REV. 1693, 1700–02 (1993).

[20]*See* North Carolina Advisory Committee to the United States Commission on Civil Rights, *In-School Segregation in North Carolina Public Schools*, (Washington, DC: Government Printing Office, 1991); U.S. General Accounting Office, *Within-School Discrimination: Inadequate Title VI Enforcement by the Office for Civil Rights* (Washington, DC: Government Printing Office, 1991).

[21]*See* National Council on Disability, "Improving the Implementation of the Individuals with Disabilities Education Act: Making Schools Work for All of America's Children," May 9, 1995, p. 10.

[22]*See* The American Association of University Women Educational Foundation, *The AAUW Report: How Schools Shortchange Girls*, 1992, pp. 26–28; National Science Foundation, *Women and Minorities in Science and Engineering*, January 1990.

in American public elementary and secondary education. As stated in the Commission's approved project narrative, the purpose of this project is to "evaluate the efforts of the [U.S.] Department of Education (DOEd) and its Office for Civil Rights (OCR) [in enforcing] a variety of laws mandating equal educational opportunity."[23] The Commission has examined key issues identified by the Department of Education and other education experts as reflecting the most significant problems faced by students *within schools and classrooms*. In meeting this task, the Commission has focused on four issues for this project series:

(1) ability grouping and tracking of students;[24]

(2) development of individualized education programs for and placement of students classified as educable mentally retarded, students with learning disabilities, students with behavioral disabilities, and students with serious emotional disturbance;

(3) development of education programs for and placement of students with limited English proficiency; and

(4) the difficulties faced by female students in gaining equal access to advanced mathematics and science courses.[25]

Since the early 1990s, DOEd has chosen to focus on many of these issues as priority topics in conducting education research and performing civil rights compliance and enforcement activities. These issues encompass educational practices that exist currently in America's schools. They reach beyond the issues of interdistrict and intradistrict school desegregation to

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[23]U.S. Commission on Civil Rights, "Equal Educational Opportunity Project, Project Proposal," p. 3. Based on the approved project proposal, the Equal Educational Opportunity Project Series addresses the following civil rights laws:

(1) Title IV of the Civil Rights Act of 1964;

(2) Title VI of the Civil Rights Act of 1964;

(3) Title IX of the Education Amendments of 1972;

(4) Section 504 of the Rehabilitation Act of 1973;

(5) Equal Educational Opportunity Act of 1974 (EEOA); and

(6) Education for All Handicapped Children Act of 1975 (renamed the Individuals with Disabilities Education Act (IDEA)). Ibid.

The Commission recognizes that the U.S. Department of Education's Office for Civil Rights (OCR) does not have responsibility for enforcing the EEOA or the IDEA. The project reports discuss these laws only as they relate to OCR's responsibilities.

[24]Despite the prevalence and importance of within-school grouping practices, no uniform definitions exist to clarify the distinctions among various types of grouping practices. Moreover, often terms that are defined specifically by one source are then used interchangeably by another. *See* Edward L. Dejnozka and David E. Kapel, *American Educators' Encyclopedia* (New York: Greenwood Press, 1991), p. 577. For purposes of clarity in this series of reports, "within-school grouping" is used to encompass the broad range of programs and practices that divide students within a school, grade, and/or classroom. These include ability grouping, tracking, advanced placement programs, honors programs, special education, gifted and talented programs, magnet programs, remedial programs, and/or multilevel reading or mathematics groups within a single classroom.

Ability grouping practices, the primary focus of the fourth report in this series, are equally difficult to define conclusively. In its broadest sense, ability grouping is the practice of grouping students within grade levels or classes according to their estimated capacity to learn or perform. *See* Office for Civil Rights, U.S. Department of Education, *Annual Report to Congress, Fiscal Year 1991*, (1992), p. 19. Primarily, placement in an ability group is based on one or more of the following criteria: (1) performance on intelligence tests; (2) scores on achievement tests; (3) past academic performance in the classroom; (4) teacher evaluations or recommendations; and (5) parent or student choice. Joseph E. Bryson and Charles P. Bentley, *Ability Grouping of Public School Students: Legal Aspects of Classification and Tracking Methods* (Charlottesville, VA: The Michie Co., 1980), pp. 8–9; and Edward L. Dejnozka and David E. Kapel, *American Educators' Encyclopedia* (New York: Greenwood Press, 1991), p. 577.

In some contexts, distinctions have been made between ability grouping and achievement grouping. *See* Joseph E. Bryson and Charles P. Bentley, *Ability Grouping of Public School Students: Legal Aspects of Classification and Tracking Methods* (Charlottesville, VA: The Michie Co., 1980), pp. 8–9. However, for the purposes of this series of reports, the Commission considers ability grouping as a practice that encompasses both ability and achievement grouping.

The term "ability grouping" is often used interchangeably with the term "tracking." However, for purposes of clarity in this series of reports, tracking is used to describe the placement of secondary education students in specific curriculum programs, such as general, vocational, business, or college preparatory curricula. *See* Joseph E. Bryson and Charles P. Bentley, *Ability Grouping of Public School Students: Legal Aspects of Classification and Tracking Methods* (Charlottesville, VA: The Michie Co., 1980), p. 9; Edward L. Dejnozka and David E. Kapel, *American Educators' Encyclopedia* (New York: Greenwood Press, 1991), p. 577. Tracking is different from ability grouping in that parents and students have some choice in the programs of study. As with ability grouping, placement in tracks may be based on intelligence tests, achievement tests, past performance, teacher judgments, or a combination of these factors.

[25]These issues represent only some of many related to equal educational opportunity in public elementary and secondary education in the United States. Other topics, such as school finance systems, gender equity in school athletic programs, racial harassment in schools, sexual harassment in schools, and content of curricula have important implications for equal educational opportunity for students. The Commission recognizes that these topics are of no less importance or relevance to a study on equal educational opportunity. However, for the purposes of this project series, the Commission has focused primarily on the education experiences within the school and classroom and, consequently, on the four issues listed above.

address contemporary experiences within the classroom. They serve as avenues for exploring some of the present-day barriers and inequities faced by students. It is these barriers and inequities, as well as others, as evidenced by research reports and complaints filed, that prevent all students from having an equal opportunity to participate in educational programs, to maximize their learning potential, and to enhance their educational and career opportunities. These issues are of great concern to parents and students, and they form the basis of discrimination complaints filed by individuals throughout the country.

Researchers have identified services and initiatives critical to the educational development and achievement of poor and minority students. These initiatives have included preschool child development programs; reading programs in the early grades; reduction of student-to-teacher ratios; the provision of counseling; the identification of health and social service needs; the involvement of parents in the education of their children; the identification, certification, hiring, and retention of experienced teachers; the availability of broad and challenging curricula; frequent assessments of student progress; and modifications in grouping practices and instructional content to meet specific needs.[26] In addition, legislation and policymaking have favored regular education placements, recognizing an efficacy in educating students with disabilities and students with limited English proficiency in regular classes. For example, Congress enacted the Individuals with Disabilities Education Act to encourage the inclusion of students with disabilities in classes with nondisabled students.[27] Likewise, in its policy addressing the Supreme Court ruling in *Lau v. Nichols*,[28] DOEd has sought to encourage school systems to integrate students with limited English proficiency into regular education classes.

Based on a review of literature, law, and policies, the enforcement effort has identified five factors that affect equal access to a quality education:

(1) structuring education programs to serve a diverse student population by maintaining a primary objective to place students in regular classes and core academic curricula to the greatest extent possible; grouping students to reflect differential ability in various subjects; reevaluating and regrouping students periodically to reflect both the differential ability in various subjects and changes in achievement, performance, and development;

(2) utilizing neutral and nondiscriminatory diagnostic and screening procedures when placing students in educational programs;

(3) providing parental notification and ensuring that institutional programs facilitate and encourage the involvement of parents in their children's education;

(4) evaluating and allocating teachers, facilities, and other resources among education programs;[29] and

(5) eliminating barriers, providing access to all subjects, activities, and career opportunities and counseling each student to maximize his or her potential opportunities.

These factors are key components to structuring nondiscriminatory educational programs and advancing equal educational opportunity for all students. Congress incorporated these principles into civil rights laws and program statutes, such as the Individuals with Disabilities Education Act and the Elementary and Secondary Education Act of 1965.[30] Moreover, the DOEd included

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[26]*See* William L. Taylor, *The Continuing Struggle for Equal Educational Opportunity*, 71 N.C. L. REV. 1693, 1699, 1704 (1993). *See also* Robert L. Crain and Rita E. Mahard, *Desegregation Plans that Raise Black Achievement: A Review of the Research* 35-45 (June 1982); James McPartland and JoMills Henry Braddock, "Going to Colleges and Getting a Good Job: The Impact of Desegregation," in *Effective School Desegregation*, ed. Willis D. Hawley (1981), p. 141; James McPartland, *Desegregation and Equity in Higher Education and Employment: Is Progress Related to the Desegregation of Elementary and Secondary Schools?*, 42 LAW & CONTEMP. PROBS. at 108, 110–113, 124, 131 (Summer 1978); Robert Crain and Jack Strauss, *School Desegregation and Black Educational Attainment* 12–29 (Center for Social Organization of Schools, The Johns Hopkins Univ. Rep. No. 359, July 1985); John R. Berrueta-Clement and others, Changed Lives: *The Effects of the Perry Pre-School Program on Youths Through Age 19* (1984); Fern Marx and Michelle Seligson, *The Public School Early Childhood Study: The State Survey* 3 (1988); Fred Hechinger, ed., *A Better Start: New Choices for Early Learning* (1986); Sharon L. Kagan and Edward F. Zigler, eds., *Early Schooling: The National Debate* (1987).

[27]*See* 20 U.S.C. §§ 1412(5), 1414(a)(1)(C)(iv), 1401(20)(C) (1994 and Supp. V).

[28]414 U.S. 563 (1974).

[29]In addressing this factor, the project reports focus on the quality and distribution of teaching staff and resources for students. For example, the reports discuss what standards schools, State education agencies (SEAs), and the U.S. Department of Education's Office for Civil Rights (OCR) have established for determining that teachers are appropriately trained and certified. They discuss whether and how schools, SEAs, and OCR determine that facilities, books, and other resources are of an appropriate quality level and to what extent schools, SEAs, and OCR ensure that teaching staff and resources are distributed in a nondiscriminatory manner.

[30]*See* 20 U.S.C. § 1401(20)(C) (1994 & Supp. V); 20 U.S.C § 1409(a),(h)(1) (1994 & Supp. V); 20 U.S.C. § 1412(a)(2)(E), (5), (7), (11), (12) (1994 & Supp. V); 20 U.S.C. § 1413(a)(12,14) (1994 & Supp. V); 20 U.S.C. § 1414(a)(1)(C), (5), (7) (1994 & Supp. V); 20 U.S.C. § 1415(a),(b)(1)(A-E),(b)(2) (1994 & Supp. V); 20 U.S.C. § 1415(c-d) (1994 & Supp. V); 20 U.S.C. § 1431(a-c) (1994 & Supp. V); 20 U.S.C. § 1432 (1994 & Supp. V); 20 U.S.C. § 6301 (1994 & Supp V) (Title I Programs); 20 U.S.C. § 7231 (1994 & Supp V) (Women's Educational Equity Act

many of the factors in its regulations and policies for section 504 of the Rehabilitation Act of 1973 and Title VI of the Civil Rights Act for 1964.[31] The Commission views these principles as crucial to ensuring nondiscrimination and promoting equal educational opportunity for all students. Consequently, in developing the Equal Educational Opportunity Project Series, the Commission has studied how the factors have been addressed in ability grouping and tracking of students and in educating students with limited English proficiency, students with disabilities, and female and minority students in advanced mathematics and science courses.

Research groups, educators, and other professionals have conducted studies and published articles on many of these issues and factors. However, to date, no one project has addressed all in a comprehensive and integrated fashion. As an independent, bipartisan agency, the Commission has undertaken this project series to study these topics and present its findings and recommendations in a comprehensive series of enforcement reports. The reports discuss steps taken by the Federal Government, State and local education agencies, school systems, and schools to prevent discrimination and to eliminate barriers to equal educational opportunity. Furthermore, the Commission's reports strive to promote nondiscrimination and equal educational opportunity by discussing criteria for evaluating educational practices from a civil rights perspective.

By providing information on civil rights factors to consider when developing and implementing educational programs, the Commission hopes that the Federal Government, States, local schools, parents, teachers, and students can work together to promote equal educational opportunities for all students.

Volume I

The first volume in the Equal Educational Opportunity Project Series sets the stage for the remaining reports, and provides findings and recommendations on the DOEd's civil rights enforcement activities generally. It describes the history of the Federal presence in education and then provides a brief overview of DOEd's organization and structure. Because the civil rights laws addressed in this project cover DOEd's Federal financial assistance programs, this volume also provides a summary of DOEd's programs to inform the reader of the specific education programs covered by the civil rights laws. This volume also discusses national trends in education generally and trends relevant to issues discussed in the project series. The discussion of national trends is based on a review and presentation of statistical data obtained from a variety of sources. Finally, the Commission offers its initial enforcement report in the series with findings and recommendations relating to the overall implementation, compliance, and enforcement efforts of OCR relating to the four focus issues in public elementary and secondary schools. This report evaluates and analyzes the history, performance, regulations, policies, and activities of the Office of Civil Rights.

Volumes II–V

Volumes II through V of the Equal Educational Opportunity Series will focus specifically on each of the project's focus issues. These four reports also will serve as statutory enforcement reports, offering findings and recommendations on the specific activities of DOEd's Office of Civil Rights relating to each issue.

The Commission recognizes that a student's economic or family background, for example, can have profound influences on the student's educational opportunities. Some Federal financial assistance programs, such as Title I (chapter 1) of the Elementary and Secondary Education Act, the Even Start Family Literacy Program, and the First Family School Partnership Program, attempt to address such factors. These programs have been a key source of funds for improving conditions in inner-city schools.[32] In addition, the Women's Educational Equity Act Program has funded research and initiatives to promoting women's educational opportunities, including their participation in mathematics and science curricula and career fields.[33] The Bilingual Education Act has provided funding to assist local school systems in educating students with limited English proficiency.[34] Because the role of these programs in promoting equal educational opportunity, volumes II through V of the project series provide detailed descriptions of DOEd's programs.[35] The volumes also discuss the role of the

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Program); and 20 U.S.C. § 7400 (1994 & Supp. V) (Bilingual Education Programs).

[31]*See* 34 C.F.R. pt. 104 (1995); Michael L. Williams, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP students)," Sept. 27, 1991.

[32]*See* William L. Taylor, *The Continuing Struggle for Equal Educational Opportunity*, 71 N.C. L. REV. 1693, 1699 (1993).

[33]20 U.S.C. § 7231 (1994 & Supp. V).

[34]20 U.S.C. § 7400 (1994 & Supp. V).

[35]The project series focus on the following Federal financial assistance programs:

(1) Desegregation Assistance Program;
(2) Magnet School Assistance Program;
(3) Even Start Family Literacy Program;
(4) Women's Educational Equity Act Program;
(5) First Family School Partnership Program;
(6) Star Schools Program;

DOEd's program offices as those offices relate to the relevant issue.

These reports each discuss the educational and civil rights perspectives on the issues and factors. They summarize the works of educational experts addressing their theories, research, assessments, and opinions. They also describe the educational practices and present a wide range of viewpoints held by educators and other professionals. To the extent the DOEd or OCR has encouraged or recommended certain educational practices as consistent with civil rights initiatives, the reports discuss DOEd's and OCR's activities to support the practices. The reports summarize historical and contemporary legal background. They analyze the extent to which the legislative, executive, and judicial branches of our Federal Government have considered the issues in creating and interpreting civil rights laws and regulations. The reports then assess the implementation, compliance, and enforcement of civil rights laws by OCR. The reports focus on activities at OCR's headquarters and regional levels to determine the extent and quality of its efforts. The reports also assess the standards created by OCR to ensure and promote nondiscrimination in federally assisted and conducted educational programs. By integrating an understanding of both educational practices and civil rights enforcement within the body of these reports, the Commission emphasizes the importance of providing both educational equity *and* educational excellence to all students regardless of race, color, national origin, gender, or disability.

Volume VI

The sixth and final report presents profiles on five school districts: Prince Georges County, Maryland; St. Marys County, Maryland; Charlotte-Mecklenburg, North Carolina; Seattle, Washington; and Albuquerque, New Mexico. In addressing the education and civil rights enforcement perspectives, the report focuses on the activities and experiences at these local educational agencies. The report illustrates what initiatives the school districts have taken relating to the project issues and factors. In doing so, it provides an understanding of the project in the context of students' day-to-day experiences. For example, the report describes a school system's process for identifying and placing students into certain educational programs and for developing educational programs to meet the needs of its students. In addition, the report assesses whether the school system incorporates civil rights and equal educational opportunity considerations into its operations.

Goals of the Equal Educational Opportunity Project Series

The Commission has four major goals for this project series:

- **Goal 1**—To determine whether OCR's policies and regulations comport with existing civil rights and education law; whether its policies, regulations, or the law require revision or elaboration; and whether its civil rights enforcement and compliance procedures are effective;
- **Goal 2**—To determine whether the education and enforcement measures taken by OCR adequately ensure compliance with the laws, specifically whether OCR's mandated technical assistance and monitoring standards are adequate;
- **Goal 3**—To evaluate OCR's criteria for selecting jurisdictions for on-site compliance reviews; and
- **Goal 4**—To present the many differing viewpoints reported in the educational research literature relating to factors promoting equal educational opportunity and the project's main issues, as a means of showing the nexus between educational theory and civil rights policy, including implementation, compliance, and enforcement.

These goals encompass virtually all areas of civil rights implementation, compliance, and enforcement, including the regulatory and policymaking processes, outreach and education, technical assistance, training, monitoring, compliance reviews, complaint investigations, and the administrative and litigation processes.

In meeting these goals, the Commission evaluated OCR's implementation, compliance, and enforcement efforts at several levels—1) headquarters; 2) regional; 3) State; and 4) local. The Commission has undertaken the following activities in preparing this report: 1) at the regional level, the Commission interviewed selected OCR regional offices;[36] 2) the Commission selected and

(7) Eisenhower Mathematics and Science National and State Programs;
(8) Jacob K. Javits Gifted and Talented Students Education Program;
(9) Title I (Chapter 1) Program Grants under the Elementary and Secondary Education Act;
(10) Early Education for Children with Disabilities;
(11) State Grants for Special Education;
(12) Program for Children and Youth with Serious Emotional Disturbance; and
(13) Bilingual Education Program.

[36]The Commission conducted onsite and telephone interviews with staff members at OCR's Region IV office in Atlanta, Georgia. It conducted telephone interviews with staff members in the following OCR regional offices: Region II—New York, New York; Region III—Philadelphia, Pennsylvania; Region VI—Dallas, Texas; Region VII—Kansas City, Missouri; Region VIII—Denver,

analyzed localities throughout the United States to serve as case studies for this project; 3) the Commission assessed OCR's procedures and organization at the headquarters and regional levels to determine whether they are sufficient and effective for the enforcement of civil rights laws for the project's focus issues; 4) the Commission reviewed OCR's policies and regulations implementing civil rights laws; 5) the Commission determined the extent to which these policies and regulations conform with the civil rights laws; and 6) the Commission reviewed OCR's efforts in conducting compliance reviews, complaint investigations, monitoring, and providing technical assistance, outreach, education, and training for the project's main issues.

The Commission believes that a primary concern in federally assisted and federally conducted educational programs, should be the promotion of educational excellence for all students through the guaranteeing of nondiscrimination and protection of students' rights under civil rights laws. A discussion of equal educational opportunity must incorporate both a focus on quality education and a focus on protection from discrimination and equal opportunity.

The Commission has undertaken this project to produce a series of reports benefiting a variety of audiences, including the President, Congress, DOEd, State and local education agencies, the general public, parents, and, most importantly, students in America's public elementary and secondary schools. Through the Equal Educational Opportunity Project Series, the Commission intends to accomplish the following objectives.

Objectives with Respect to the President and Congress

- Provide an assessment for the President and Congress on efforts to enforce the selected civil rights laws relating to the project's issues and to factors promoting equal educational opportunity;
- Report on the accomplishments of DOEd in enforcing civil rights laws and how those efforts have improved the quality of education for students in public elementary and secondary schools; and
- Offer recommendations on changes in the law that would further improve or enhance civil rights enforcement in public elementary and secondary education, further promote nondiscrimination in America's schools, and further assist in eliminating barriers to equal educational opportunity for students.

Objectives with Respect to the U.S. Department of Education

- Assist DOEd in further improving its efforts to enforce civil rights and promote equal education opportunity relating to the project's issues and factors by:
- Offering recommendations for the improvement of DOEd's existing efforts to implement and enforce civil rights laws;
- Providing DOEd with new perspectives on educational practices relating to the project's main issues through a summary of contemporary educational literature, and by reporting on the experiences and achievements of schools at the State and local level; and
- Reporting on experiences at the State and local level and recommending ways DOEd can continue to improve civil rights implementation, compliance, and enforcement efforts in dealing with State and local education agencies.

Objectives with Respect to State and Local Education Agencies, School Systems, Schools

- Remind State and local education agencies of their responsibilities under the law and under DOEd's regulations;
- Remind State and local education agencies, school systems, and schools about new perspectives relating to the project's issues by presenting a literature review summary on current educational practices and by reporting on the experience and achievements of other State and local education agencies, school systems, and schools;
- Assist State and local education agencies in improving their mechanisms to address civil rights enforcement;
- Assist State and local education agencies in improving their educational and administrative practices, procedures, and standards to ensure operation in a nondiscriminatory manner and to promote equal educational opportunity for all students to the maximum extent possible (i.e., evaluation procedures and processes);
- Assist in the identification of barriers to equal educational opportunity by providing suggestions and examples of how civil rights considerations should be factored into the development, implementation, and modification of educational programs; and
- Encourage school systems and schools to make civil rights a primary consideration in the development, implementation, and modification of educational programs to ensure that all students have equal access to programs and greater educational opportunities.

Colorado; Region IX—San Francisco, California; and Region X—Seattle, Washington.

Objectives with Respect to the General Public

- Increase understanding of the educational and civil rights perspectives relating to the project's main issues; and
- Increase awareness among the public of the inequities faced by students in the United States' public elementary and secondary schools in an effort to prompt change.

Objectives with Respect to Parents and Students

- Inform parents and students of their rights under the law;
- Inform parents and students of how DOEd, State and local education agencies, and the schools and school systems have worked to ensure their rights and promote equal educational opportunity; and
- Inform parents and students of the importance of civil rights considerations in the development, implementation, and modification of educational programs.

Objectives with Respect to Students

- Work to ensure that students receive public elementary and secondary education in a nondiscriminatory manner by assisting in the improvement of civil rights enforcement at the Federal, State, and local levels;
- Facilitate the development of educational programs that assist each student, regardless of race, color, national origin, gender, or disability, to maximize her or his learning potential; and
- Work to ensure that students, regardless of race, color, national origin, gender, or disability, will not unnecessarily suffer from debilitating effects on their educational performance and achievement due to unlawful educational practices.

The report that follows is the first of several enforcement reports that will assist in ensuring that educational practices do not violate the law. The Commission intends to use this series of reports to ensure that students will not be relegated unfairly to low-ability groups, inappropriate tracks, special education or remedial education programs; that they will not be classified inappropriately as disabled or as having specific types of disabilities; and that they will not be prevented from participating in regular education classes, gifted and talented programs, mathematics and science courses, or other opportunities for education and advancement, due to their race, color, national origin, gender, or disability.

Chapter 2

The Evolution of the Federal Role in Education: From Policy to the Creation of the Department of Education

Background

In the United States, education traditionally has been primarily a State and local function.[1] Local school districts, governed by local boards of education, administer public elementary and secondary schools. State boards of education and States' chief State school officers play an advisory and regulatory role.[2] Funding for the schools comes primarily from local and State sources. Since the early part of the 20th century, the local share of expenditures on schooling has diminished, and the State share has increased. By the 1980s, the percentage of funding coming from State sources, which at the beginning of the century constituted less than 20 percent of public school funding, had reached the percentage coming from local sources. Today, 47 percent of public school funds come from State sources, 47 percent from local sources, and the remainder (6 percent) from the Federal Government.[3]

Although State and local governments always have been the principal providers of public education, the Federal Government has had a "strong interest" in education.[4] According to Secretary of Education, Richard W. Riley, "[T]he federal government has a vital and meaningful role to play as a partner and as a source of information, technical and financial assistance, encouragement, and leadership."[5] Although disputed, Secretary Riley and other commentators believe one constitutional basis for Federal involvement in education can be found in the power given to Congress to provide for the "common defense and general welfare of the United States."[6] Another basis is derived from the rights afforded in the equal protection clause of the 14th amendment.[7]

Federal aid to education is based on the appropriateness of the Federal Government's responsibility in meeting national needs. One example, in this century, was legislation that authorized the development of vocational education. Several decades later, the G.I. Bill afforded World War II veterans benefits for educational opportunities. In the late 1950s, Federal legislation provided for improvements in mathematics and science instruction in response to the Soviet Union's launching of the Sputnik satellite.[8] More recently, Federal educational programs have been targeted to equal opportunity for the economically disadvantaged, children with disabilities, and females.

Although the Federal Government has enacted statutes addressing educational matters since its creation,[9] its role in education has increased dramatically within the last few decades. From policy implementation to creating a department, the Federal Government has been a major figure in education practices, policies, and funding. Over the last century, the increased demand for educational equity and excellence has led to an increased Federal leadership role in education.

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[1]Richard W. Riley, "Redefining the Federal Role in Education: Toward a Framework for Higher Standards, Improved Schools, Broader Opportunities, and New Responsibilities for All," *Journal of Law and Education*, vol. 23, no. 3 (Summer 1994), p. 295 (hereafter cited as Riley, "Redefining the Federal Role in Education").

[2]James A. Johnson, Harold W. Collins, Victor L. Dupuis, John H. Johansen, *Introduction to the Foundations of American Education*, 9th ed. (Boston: Allyn and Bacon, 1994), pp. 195–207 (hereafter cited as *Foundations of American Education*).

[3]Ibid., p. 216.

[4]Ibid., pp. 215–17.

[5]Riley, "Redefining the Federal Role in Education," p. 295.

[6]U.S. CONST. art. I, § 8, cl. 1. *See* Riley, "Redefining the Federal Role in Education," pp. 297–99. However, the constitutional basis for Federal involvement in promoting equal educational opportunity also arises from the 14th amendment. *See* Kenneth S. Tollett, "The Propriety of the Federal Role in Expanding Equal Educational Opportunity," *Harvard Educational Review*, vol. 52, no. 4 (November 1982), pp. 435–37 (hereafter cited as Tollett, "The Federal Role in Expanding Equal Educational Opportunity").

[7]U.S. Const. amend. XVI, sec. 1.

[8]Ibid., p. 103.

[9]For instance, in 1787, the Northwest Ordinance required States in the Northwest Territory to set aside land in each township as a means of providing for public schools. *See* Carl F. Kaestle and Marshall S. Smith, "The Federal Role in Elementary and Secondary Education: 1940–1980," *Harvard Educational Review*, vol. 52, no. 4 (November 1982), pp. 387–88 (hereafter cited as Kaestle and Smith, "The Federal Role In Elementary and Secondary Education").

Federal Education Legislation: 1860s–1960s

The first major Federal involvement in education came in 1862, when Congress passed the Morrill Act[10] creating the first Federal categorical aid program for education—the Federal land grant program to States to support colleges teaching agriculture and mechanical arts.[11] After the Civil War, the Reconstruction period included the Freedmen's Bureau legislation aimed at aiding education for freed slaves.[12]

In 1868, President Andrew Johnson signed legislation to create the first Department of Education,[13] a noncabinet level agency that lasted less than 1 year. Congress established the department to collect information and statistics about the Nation's schools. Political pressures generated by the fear that the new department would exercise too much control over local schools resulted in the department being reconstituted as an "Office of Education" within the Department of the Interior.[14] The Office of Education, sometimes called the "Bureau of Education" remained a relatively small office within the Department of the Interior for the next 60 years. In 1939, President Franklin Roosevelt moved the office into the Federal Security Agency.[15] In 1953, with the creation of the U.S. Department of Health, Education, and Welfare (HEW), an Office of Education was established within that Department.[16] By that time, the role of the Office of Education had expanded considerably beyond its origins as a clearinghouse agency, as it increasingly was given more funding and took on responsibilities for managing Federal education programs.[17]

Before the Second World War, the only large and continuing Federal education program at the elementary and secondary level was support for vocational education authorized in the Smith-Hughes Act of 1917 and reauthorized several times thereafter.[18] The Second World War brought about several Federal education programs, including: The Lanham Act of 1940, which authorized Federal aid to schools in localities whose populations were increased because of the defense effort and, at the end of the war, the Serviceman's Readjustment Act of 1944, popularly known as the GI Bill, which provided financial aid to veterans attending college.

In the 1950s, the Cold War fed the impetus to increasing the level of Federal involvement in education. During this period, several authors wrote influential books that decried the state of American education and were highly critical of the education establishment which, they believed, had contributed to the "anti-intellectualization" of American education. Authors such as Vannevar Bush,[19] Harvard president James B. Conant,[20] historian Arthur Bestor,[21] and Admiral Hyman G. Rickover[22] all stressed the need for an improvement in the teaching of mathematics and science in the schools as a means of strengthening the national economy and preserving national security.[23] In 1950, Congress passed the National Science Foundation Act, creating the National Science Foundation to coordinate Federal scientific research efforts.[24] National security concerns also prompted the enactment of the National Defense Education Act of 1958.[25] This act provided Federal aid to improve education in the areas of mathematics, science, and foreign languages, and later provided aid to improve

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[10]Act of July 2, 1862, ch. 130, 12 Stat. 503 (codified as amended at 7 U.S.C. §§ 301–308 (1988)).

[11]Skee Smith, "The U.S. Department of Education: Long-awaited Congressional Action Places the Secretary of Education in the President's Cabinet and puts a Major National Concern into Sharp Focus," *American Education*, U.S. Department of Health, Education, and Welfare, Office of Education, November 1979, p. 6 (hereafter cited as Smith, "The U.S. Department of Education").

[12]Freedmen's Bureau Bills, 13 Stat. 507 (1865), 14 Stat. 173 (1866). *See* Tollett, "The Federal Role in Expanding Equal Educational Opportunity," p. 431.

[13]An Act of the Fortieth Congress, Sess., II. Ch. 176, 1868.

[14]*But see* Mark Youngblood Herring, *Minerva at Large: A Study of the Leadership Styles and Educational Philosophies of the Department of Education Secretaries*, Ph.D. Dissertation, East Tennessee State University, 1990, pp. 60–62 (hereafter cited as Herring, *Leadership Styles and Educational Philosophies*) (attributes the change at least in part to the political incompetence of the first Commissioner of Education, Henry Barnard).

[15]U.S. Department of Education, "ED Facts—Information about the U.S. Department of Education," pp. 3–4 (hereafter cited as "ED Facts"); Smith, "The U.S. Department of Education," p. 6; *Foundations of American Education*, p. 218; Beryl A. Radin and Willis D. Hawley, *The Politics of Federal Reorganization: Creating the U.S. Department of Education* (New York: Pergamon Press, 1988), pp. 15–16 (hereafter cited as Radin and Hawley, *Creating the U.S. Department of Education*).

[16]*Foundations of American Education*, p. 206.

[17]*See* Herring, *Leadership Styles and Educational Philosophies*, pp. 80–81.

[18]Kaestle and Smith, "The Federal Role in Elementary and Secondary Education," pp. 388–89.

[19]Vannevar Bush, *Science—The Endless Frontier: A Report to the President* (Washington, D.C.: Government Printing Office, 1951).

[20]James B. Conant, *The American High School Today* (New York: McGraw-Hill, 1959).

[21]Arthur Bestor, *Educational Wastelands: The Retreat from Learning in Our Public Schools* (Urbana: University of Illinois Press, 1953).

[22]Hyman Rickover, *Education and Freedom* (New York: E.P. Dutton, 1959).

[23]*See* Joel Spring, *The American School, 1642–1993*, 3rd ed. (New York: McGraw-Hill, 1994), pp. 373–83.

[24]Norman C. Thomas, *Education in National Politics* (New York: David McKay, 1975), pp. 21–22.

[25]Pub. L. No. 85–864, 72 Stat. 1580.

graduate studies in history and the social sciences. The National Defense Education Act funds were limited and highly targeted categorical grants to State and local education agencies.[26]

In contrast to the enactment of the National Defense Education Act, which was pushed by the scientific and military establishment, the postwar period witnessed numerous defeats to more widespread proposals for expanding general Federal aid to education. Despite the existence of numerous and powerful advocates for expanded Federal aid, such as the National Education Association, most aid proposals were defeated because of fears that Federal aid would mean Federal control, controversy over whether Federal aid should be given to religious schools, and questions of whether Federal aid should be denied to racially segregated schools.[27]

Over the next several decades, two parallel and interrelated developments combined to increase the Federal role in education. First, the civil rights movement brought about the enactment of a series of civil rights laws to ensure nondiscrimination in public education. Second, under President Johnson's Great Society program, Federal aid to education expanded sharply, giving the Office of Education increasing responsibilities.

The Emerging Federal Role in Education

Beginning after World War I and gaining momentum after World War II, African Americans, and other minorities, developed a powerful civil rights movement. Because they saw education as the key to upward mobility, civil rights activists hoped this was one area where the Federal Government would listen to their concerns. The momentum for educational reforms, such as desegregation, provided civil rights activists with a legitimate platform from which to extend the struggle for equality. The success of the civil rights movement in creating a Federal civil rights enforcement mandate led to further expansion of the Federal role in education in the 1960s.

Starting in the 1930s, the National Association for the Advancement of Colored People (NAACP) began acting out a deliberate strategy of challenging school segregation with the ultimate goal of overturning the Supreme Court's 1896 "separate but equal" decision in *Plessy v. Ferguson*,[28] which sanctioned segregated schools.[29] This strategy yielded success in 1954, when the Supreme Court, in *Brown v. Board of Education of Topeka Kansas*,[30] established the principle that all children are guaranteed equal educational opportunities. The Court stated: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity is a right which must be made available to all on equal terms."[31] The Court held that "separate educational facilities are inherently unequal,"[32] and "to separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[33]

The *Brown* decision made clear that *de jure* segregation of the schools was not permissible. Furthermore, it contained language suggesting that *de facto* segregation might also be prohibited. However, *Brown* did not provide for an effective mechanism for ensuring that school districts abided by the decision. One year after the *Brown* decision, the Supreme Court issued a second decision,[34] *Brown II*, that gave Federal district courts primary responsibility for ensuring that school districts devised appropriate desegregation plans. Although *Brown II* directed the district courts to require "defendants to make a prompt reasonable start toward full compliance" with the *Brown* decision, it deferred to the South by stopping short of requiring immediate compliance. Furthermore, it did not provide guidance as to what constituted compliance, leaving this decision, as well as the decisions about how fast to compel compliance, to the district courts.[35]

Although some border States took prompt steps to desegregate their schools, most school districts in the

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[26] *See* Stephen K. Bailey and Edith K. Mosher, *ESEA: The Office of Education Administers a Law* (Syracuse: Syracuse University Press, 1968), pp. 20–21 (hereafter cited as Bailey and Mosher, *The Office of Education Administers a Law*); Gerald Gutek, *Education in the United States: An Historical Perspective* (Englewood Cliffs, NJ: Prentice-Hall, 1986), pp. 279–80 (hereafter cited as Gutek, *Education in the United States*); Joel Spring, *The Sorting Machine: National Educational Policy Since 1945* (New York: David McKay, 1976), pp. 96–113 (hereafter cited as Spring, *The Sorting Machine*).

[27] *See* Diane Ravitch, *The Troubled Crusade: American Education, 1945–1980* (New York: Basic, 1983) pp. 26–42; Gutek, *Education in the United States*, pp. 261–62, 292; Eugene Eidenberg and Roy D. Morey, *An Act of Congress: The Legislative Process and the Making of Education Policy* (New York: Norton, 1969), pp. 18–23 (hereafter cited as Eidenberg and Morey, *An Act of Congress*); Spring, *The Sorting Machine*, p. 223.

[28] 163 U.S. 537 (1896).

[29] *See* Ravitch, *The Troubled Crusade*, pp. 120–27.

[30] 347 U.S. 483 (1954).

[31] *Id.* at 497.

[32] *Id.* at 494.

[33] *Id.*

[34] Brown v. Board of Education of Topeka, Kansas, 349 U.S. 294 (1955).

[35] Ravitch, *The Troubled Crusade*, pp. 128–30.

deep South overtly resisted desegregation or adopted complicated school assignment polices that ostensibly permitted integration, but in fact prevented black students from attending white schools.[36] The district courts did little to ensure that desegregation occurred. Few school districts had taken significant steps towards desegregation by 1964, a full 10 years after the *Brown* decision.[37] In 1964, only 9.3 percent of African American students in 17 southern and border States attended desegregated schools, most of them in the border States. In the South itself, only 1.2 percent of African American students attended schools with white students.[38] This was the situation when President Lyndon B. Johnson succeeded in enacting the landmark civil rights statute, the Civil Rights Act of 1964.[39]

The Civil Rights Act provided the Federal Government with the necessary authority to enforce the *Brown* decision. Titles IV and VI of the act related directly to desegregation and nondiscrimination in the area of education. Title IV proscribed segregation in public schools.[40] It authorized the Federal Government to provide technical assistance to State and local education agencies to aid them in desegregating public schools. It also authorized grants for training teachers to address problems arising because of desegregation.[41]

Title VI prohibited the Federal Government from financially sponsoring any program or activity operated in a racially discriminatory fashion. Specifically, Title VI provided:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[42]

Thus, Title VI applied to racial discrimination in all federally funded activities, including education.

On June 19, 1963, President Kennedy submitted to Congress the proposed Civil Rights Act of 1963.[43] In the message that accompanied that proposal,[44] the President introduced the principle upon which Title VI ultimately would be founded:

> Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.[45]

Under Title VI, as it eventually was passed, Federal agencies that provided financial assistance were mandated to administer and enforce the policy. The statute set out the means by which agencies were to fulfill this responsibility. Specifically, it provided that each agency authorized to extend financial assistance must issue rules, regulations, or orders establishing the standards of recipient compliance by which Title VI will be enforced.[46] The statute further provided that an agency may enforce compliance with such rule, regulation, or order either: (1) by terminating or refusing to grant or to continue financial assistance, or (2) by "any other means authorized by law."[47]

By requiring Federal agencies to withhold funds from recipient school districts that were discriminating, Title VI gave the Federal Government a vital tool that, for a while at least, resulted in speeding the pace of school desegregation. HEW quickly issued Title VI guidelines[48] requiring school districts to submit assurances of compliance or plans for desegregation as a condition for receiving Federal funds. Allowable desegregation plans included plans that assigned pupils to schools based on compact geographic areas and "freedom of choice" plans. In its first year of enforcing Title VI, HEW succeeded in making considerably greater inroads into segregation than had been achieved by the courts in the preceding 10 years after the *Brown* decision. By late 1965, 89 percent of schools in southern and border States had integrated at least four classes, and 97 percent of southern school

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[36]Ravitch, *The Troubled Crusade*, pp. 133–34.

[37]*See* Spring, *The Sorting Machine*, pp. 156–57; U.S. Commission on Civil Rights, *Twenty Years After Brown* (Washington, DC: Government Printing Office, 1976), pp. 48–51.

[38]U.S. Commission on Civil Rights, *Twenty Years After Brown*, p. 48.

[39]Pub. L. No. 88–352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447, 42 U.S.C. § 1971, 1975, 2000 (1988)).

[40]Pub. L. No. 88–352, 78 Stat. 241 (codified as amended in 42 U.S.C. § 2000c (1988)).

[41]Pub. L. No. 88–352 §§ 404, 405, 78 Stat. 292 (codified as amended in 20 U.S.C. § 2000c (1988)).

[42]*Id.* § 2000d.

[43]*See* Raymond Celeda, *Nondiscrimination in Federally Assisted Programs: Legislative History and Analysis of Title VI of the Civil Rights Act of 1964*, Library of Congress, Legislative Referral Service, 5-6 (1975) (hereafter cited as Celeda).

[44]H.R. Doc. No. 124, 88th Cong., 1st Sess. (1963), *reprinted in* 110 U.S.C.C.A.N. 2392. *See* Celeda, p. 6.

[45]H.R. Doc. No. 124, 88th Cong., 1st Sess., 12 (1963), *reprinted in* 110 U.S.C.C.A.N. 2392. *See* Celeda, at 7.

[46]42 U.S.C. § 2000d-1 (1988).

[47]42 U.S.C § 2000d-2 (1988).

[48]U.S. Department of Health, Education, and Welfare, "General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools," Apr. 1, 1965.

districts had submitted school desegregation plans acceptable to the Department.[49] The number of black students attending schools with whites rose from 2 percent to 6 percent.[50]

Nevertheless, segregation remained prevalent. Most of the southern school districts' desegregation plans accepted by HEW were freedom of choice plans.[51] However, a U.S. Commission on Civil Rights report issued in 1966 identified 102 southern school districts with freedom of choice plans that had been accepted by the Department in which not a single black student attended school with whites.[52] In 1966, HEW issued revised guidelines[53] that disqualified most freedom of choice plans. The revised guidelines required schools to increase significantly the number of black students attending integrated schools, and to make progress in teacher integration as well.[54]

The 1966 guidelines established a Federal policy that removing legal barriers to integration was not sufficient for compliance with Title VI. School districts also needed to make real progress towards integrating students. This policy was sanctioned by the Supreme Court in a 1968 case, *Green v. New Kent County*,[55] which held that a school district must achieve actual racial integration to eliminate *de jure* discrimination.[56] Although HEW seldom withheld Federal funds from southern school districts,[57] integration did proceed at a noticeable pace during the 1960s. By 1972, 70 percent of black students in southern States were attending schools that were less than 80 percent minority.[58]

Not only did Title VI create an unambiguous Federal mandate to enforce civil rights in the area of education, but Title VI also represented an important extension of the Federal role in education. It established the precedent of using the threat of refusing Federal financial assistance as a means of influencing educational policies at the State and local level.[59] Furthermore, by establishing the Federal authority to withhold funds from State and local education agencies that were not in compliance with civil rights requirements, the enactment of Title VI removed what had been a significant obstacle to proposals to provide Federal aid to education. Before enactment of Title VI, proposals to expand Federal aid to education had all foundered because of southern opposition to the inclusion in the proposals of the "Powell" amendments, which, like Title VI, required nondiscrimination in the use of the Federal aid.[60] With Title VI obviating the grounds for including for such amendments, the issues of desegregation and Federal aid to education became separable and Southern opposition no longer was guaranteed.[61]

One year after the enactment of the Civil Rights Act of 1964, Federal aid to education increased considerably with the enactment of the Elementary and Secondary Education Act of 1965.[62] In the same year, the Higher Education Act of 1965,[63] and subsequent amendments of the act expanded dramatically the scope and dollar amount of Federal aid to education. As a result, the number of Federal education programs increased from 20 to 130, and Federal expenditures on aid to education increased from $½ billion to $3.5 billion between 1960 and 1970.[64]

Under the final days of President John F. Kennedy's administration and the beginning of President Lyndon B. Johnson's administration, the Federal Government began preparation for a "War on Poverty." In 1964, under the direction of Walter Heller, the Council of Economic Advisors released a report emphasizing equal educational

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[49]Spring, *The Sorting Machine*, p. 180.

[50]Ravitch, *The Troubled Crusade*, p. 164.

[51]*See* Ravitch, *The Troubled Crusade*, pp. 163–64; Julie Roy Jeffrey, *Education For Children of the Poor: A Study of the Origins and Implementation of the Elementary and Secondary Education Act of 1965* (Columbus: Ohio State University Press, 1978), pp. 108–09 (hereafter cited as Jeffrey, *Education For Children of the Poor*).

[52]U.S. Commission on Civil Rights, *Survey of School Desegregation in the Southern and Border States, 1965–1966* (Washington, DC: Government Printing Office, 1966), p. 31.

[53]U.S. Department of Health, Education, and Welfare, "Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964," March 1966.

[54]*See* Bailey and Mosher, *The Office of Education Administers a Law*, pp. 155–56.

[55]391 U.S. 430 (1968).

[56]*See* Ravitch, *The Troubled Crusade*, p. 175.

[57]By 1967, the Department had withheld funds from only 34 school districts and initiated proceedings against an additional 157 districts. Jeffrey, *Education for the Children of the Poor*, p. 111.

[58]U.S. Commission on Civil Rights, *Twenty Years After Brown* (Washington, DC: Government Printing Office), p. 49.

[59]Spring, *The Sorting Machine*, p. 176.

[60]Before 1964, Congressman Powell and others had included such amendments in each Federal education bill brought before Congress. Bailey and Mosher, *The Office of Education Administers a Law*, p. 21; Harvey Kantor, "Education, Social Reform, and the State: ESEA and Federal Education Policy in the 1960s," *American Journal of Education*, vol. 100, no. 1 (November 1991), pp. 62–63 (hereafter cited as Kantor, "ESEA and Federal Education Policy").

[61]Bailey and Mosher, *ESEA: The Office of Education Administers a Law*, pp. 30–31.

[62]Pub. L. No. 89–10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

[63]Pub. L. No. 89–329, 79 Stat. 1219.

[64]Kantor, "ESEA and Federal Education Policy," p. 48; Hugh Davis Graham, *The Uncertain Triumph: Federal Education Policy in the Kennedy and Johnson Years* (Chapel Hill, NC: University of North Carolina Press, 1984), p. xix.

opportunity as a primary means of combatting poverty.[65] That report became key support for passing the Economic Opportunity Act of 1964,[66] which officially launched the War on Poverty, and, the next year, the Elementary and Secondary Education Act of 1965, which gave education a central role in the War on Poverty.[67]

In formulating the Elementary and Secondary Education Act, President Johnson and his advisors also were responding to a realization that merely prohibiting discrimination in education was not sufficient to ensure equal educational opportunity. President Johnson clearly took the position that the Government needed to take affirmative steps to overcome the effects of past discrimination. He expressed this position in a speech at Howard University on June 4, 1965:

> You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "You are free to compete with all the others," and still justly believe that you have been completely fair. . . . It is not enough just to open the gates of opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result. . . . To this end equal opportunity is essential, but not enough, not enough.[68]

The Elementary and Secondary Education Act created a number of programs that provided Federal dollars to assist local school districts. On April 11, 1965, President Johnson signed the act into a law designed to expire on June 30, 1968. Later that year, Congress appropriated $1.2 billion for implementing the act, far less than the authorized appropriations of $25 billion.[69]

The heart of the Elementary and Secondary Education Act was Title I.[70] Title I created a program, commonly known as the "Title I" (formerly chapter 1) program, with the purpose of assisting local school agencies to improve educational programs for educationally deprived children.[71] The Title I program provided dollars to local school districts according to a formula based on the number of low-income children in the school district.[72] The program was central to President Johnson's War on Poverty and became the first Federal education program to provide substantial funding to school districts. Although it has been modified several times since its creation, the Title I program remains the largest Federal education financial assistance program.[73]

Title II of the Elementary and Secondary Education Act provided for grants to support the purchase of library books and other publications.[74] Title III authorized the Office of Education to award categorical grants to stimulate the development of needed educational services and promote local educational innovations.[75] Title IV authorized Federal support for educational research and training performed by universities and colleges and other institutions,[76] and Title V authorized grants to strengthen State educational agencies.[77]

The Elementary and Secondary Education Act was crafted to balance the Federal, State, and local roles in administering the Title I program. The law gave the Federal Government the authority to set general parameters for how Federal funds would be spent and how funds would be allocated among districts. It gave local school agencies the responsibility and the flexibility to devise, implement, and administer their own Title I programs. State education agencies, rather than the Federal Government, were given oversight responsibility over the local school agencies' Title I programs.[78]

In succeeding in the enactment of the Elementary and Secondary Education Act, President Johnson and Congress overcame a number of objections that had stymied previous efforts to provide substantial Federal aid to education. Among these were the issue of Federal control and the issue of whether Federal aid could be given to parochial schools. To protect against concerns that Federal aid to education under the act would inevitably lead to Federal control of education, Title VI of the act contained a provision explicitly prohibiting Federal control of education:

> Section 604. Nothing contained in the Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution or school system, or

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[65]"The Problem of Poverty in America," *The Annual Report of the Council of Economic Advisers* (Washington, D.C.: Government Printing Office, 1964).

[66]78 Stat. 508 (codified in scattered sections of 42 U.S.C).

[67]Spring, *The Sorting Machine*, pp. 192–98.

[68]Ravitch, *The Troubled Crusade*, p. 161 (quoting President Johnson's speech).

[69]Bailey and Mosher, *The Office of Education Administers a Law*, pp. 67–69.

[70]Act of September 30, 1950, Pub. L. No. 874 (codified as amended at 20 U.S.C. §§ 236–244).

[71]Pub. L. No. 89–10, Title I, § 201, 79 Stat. 27 (1965).

[72]*Id.* § 202.

[73]*See* Riley, "Redefining the Federal Role in Education," pp. 300–03.

[74]Pub. L. No. 89–10, Title II, § 201, 79 Stat. 27 (1965).

[75]*Id.* § 203.

[76]*Id.* §§ 401, 403.

[77]*Id.* § 501.

[78]Kantor, "Federal Education Policies," pp. 70–72. *See also* Norman C. Thomas, *Education in National Politics* (New York: David McKay, 1975), pp. 29–30.

over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system.[79]

Furthermore, as noted above, the act carefully balanced the roles of the Federal, State, and local government. The church-state issue was resolved by targeting Federal aid to poor students rather than to schools. With that issue resolved, President Johnson was able to obtain the support of the Catholic Church for the act.[80]

The Elementary and Secondary Education Act also established for the first time promoting equal educational opportunity as a major Federal education goal. An Executive order issued in conjunction with the Elementary and Secondary Education Act gave the Secretary of HEW and the Commissioner of Education a mandate to identify national education goals.[81] In responding to this mandate, Commissioner of Education Francis Keppel clearly embraced the assurance of equal educational opportunity as a paramount national education goal:

> [American education] must not only provide an education for everyone, but transmit the values of a democratic society and provide equal access for all to the best that education has to offer. . . .[82]

With the enactment of the Elementary and Secondary Education Act, the Office of Education's role was expanded considerably. The expanded responsibilities prompted a major reorganization of the Office of Education, giving it a structure similar to that of the U.S. Department of Education today. In particular, the reorganization created the following bureaus within the Office of Education: the Bureau of Elementary and Secondary Education, the Bureau of Higher Education, and the Bureau of Adult and Vocational Education. The reorganized structure also included one functional bureau, the Bureau of Research.[83] The reorganization, together with delays in congressional appropriations for the act, resulted in a slow start to the implementation of the act. However, by 1969, 20,000 Title I projects were active.[84]

The years following the enactment of the Elementary and Secondary Education Act brought doubts as to its effectiveness in breaking the cycle of poverty or increasing the educational achievement of poor children.[85] Early evaluations of the Title I program indicated that it was failing to live up to its promise, a failure that some have attributed to the failure of the Office of Education to monitor effectively the use of Title I funds—partly through a lack of will, partly because the structure of the act gave the Office of Education little actual authority over how Title I funds were spent.[86] Furthermore, several important studies in the mid-1960s questioned the ability of schools to decrease the gap in educational achievement between minority and nonminority students. In 1966, a report authorized by the Civil Rights Act of 1964, *Equality of Educational Opportunity*, commonly referred to as the Coleman Report after its principal author, Professor James S. Coleman of Johns Hopkins University, was released.[87] The Coleman report found that the quality of schools attended by poor and minority children had little effect on their educational achievement. Rather, socioeconomic background appeared to be the major factor determining educational achievement. The report also suggested that the social composition of the classes attended by minority students could affect their achievement.[88] The Coleman Report was followed in 1967 by a report by the U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools*, which concluded that integration, rather than measures that focused entirely on improving school quality, was the best means of improving black children's educational performance.[89] Nevertheless, the Elementary and Secondary Education Act and Title I, in particular, were authorized repeatedly during the succeeding decades.

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[79]Pub. L. No. 89–10, § 604, 75 Stat. 29 (1965).

[80]Kantor, "Federal Education Policies," pp. 61–62.

[81]Herring, *Leadership Styles and Educational Philosophies*, p. 85.

[82]Francis Keppel, *The Necessary Revolution in American Education* (New York: Harper and Row, 1966), p. 2.

[83]*See* Bailey and Mosher, *ESEA: The Office of Education Administers a Law*, pp. 72–97.

[84]Jeffrey, *Education for Children of the Poor*, p. 98.

[85]*See* Ravitch, *The Troubled Crusade*, pp. 168–73; Jeffrey, *Education for the Children of the Poor*, pp. 143–73.

[86]*See* Jeffrey, *Education for the Children of the Poor*, pp. 118–22.

[87]James S. Coleman, et. al., *Equality of Educational Opportunity* (Washington, D.C.: Government Printing Office, 1966). But cf. James S. Coleman, Thomas Hoffer, and Sally Kilgore, *High School Achievement: Public, Catholic, and Private Schools Compared* (New York: Basic Books, 1982). This study of 1,015 schools by Coleman and his colleagues found that there are ways that schools can, and do, have an impact on acheivement. Comparing Catholic high schools to public high schools, the authors found (a) that students of average ability benefit from attending a Catholic high school, (b) that the quality of the school (measured by curriculum, discipline, and effort required of students) did have important effects on student achievement, (c) that racial distribution was more likely to be uniform among Catholic schools, than in the public schools system, and (d) that the difference in levels of achievement between racial groups which is observed in the lower grades is actually reduced as students proceed through the grade levels of a Catholic high school.

[88]Ibid.

[89]U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* (Washington, DC: Government Printing Office, 1967).

Additional Federal Education Acts Inspired by the Civil Rights Act of 1964 and the Elementary and Secondary Education Act of 1965

In the decade and a half after the enactment of the Civil Rights Act of 1964 and the Elementary and Secondary Education Act of 1965, Congress continued to enhance civil rights protections for students, expand Federal involvement in education, and provide financial assistance to education. Congress enacted a series of civil rights statutes that extended legal protections against discrimination in education to limited-English-proficient, female, and disabled students. Over the years, the Elementary and Secondary Education Act was expanded with successive reauthorizations. Most of the expansions of the act were closely related to civil rights concerns and were guided by the goal of expanding educational opportunity.

When it first was authorized in 1968, the Elementary and Secondary Education Act was amended by the Bilingual Education Act of 1968, which responded to civil rights and equal educational opportunity concerns relating to students with limited English proficiency. The Bilingual Education Act,[90] codified as Title VII of the Elementary and Secondary Education Act of 1965, states the following as its policy:

> [t]he Congress declares it to be the policy of the United States, in order to establish equal educational opportunity for all children and to promote educational excellence (A) to encourage the establishment and operation, where appropriate, of educational programs using bilingual educational practices, techniques, and methods, (B) to encourage the establishment of special alternative instructional programs for students of limited English proficiency in school districts where the establishment of bilingual education programs is not practicable or for other appropriate reasons, and (C) for those purposes, to provide financial assistance to local educational agencies, and, for certain related purposes, to State educational agencies, institutions of higher education, and community organizations.[91]

The act established a grants-in-aid program for local school districts. The act did not require local school districts to provide special programs for limited-English-proficient or non-English-proficient students, nor did it require school districts to submit grant applications. Rather, the act was designed as a means of providing seed money to local education agencies to develop bilingual education programs for students with limited English proficiency.

Women also joined in the crusade for equal educational opportunity. Title VI of the Civil Rights Act of 1964 did not prohibit gender discrimination in education. However, 8 years after Title VI was passed, Congress extended the prohibition against discrimination to gender in the area of education. In 1972, Congress passed the Education Amendments Act,[92] which included Title IX prohibiting discrimination based on gender in Federal financial assistance programs in the area of education.[93] Before Title IX was enacted, only two Federal statutes (Title VII of the Civil Rights Act of 1964[94] and the Equal Pay Act of 1963) directly addressed discrimination on the basis of gender. However, these statutes prohibited sex discrimination in the area of employment only. Furthermore, before the enactment of the education amendments, both statutes exempted academic institutions from their coverage.[95] Thus, Title IX of the Education Amendments Act constituted the first congressional mandate guaranteeing gender equity in education.

Two years after the passage of Title IX, the Women's Educational Equity Act of 1974[96] was enacted in part to assist State and local education agencies in complying with that law. Not a civil rights statute, the act was enacted as part of the 1974 reauthorization of the Elementary and Secondary Education Act. Its stated purpose was:

> [T]o provide educational equity for women in the United States and to provide financial assistance to enable educational agencies and institutions meet the requirements of Title IX of the Education Amendments of 1972. It is also the purpose of this part to provide educational equity for women and girls who suffer multiple discrimination, bias, or stereotyping based on sex and on race, ethnic origin, disability, or age.[97]

The act authorized the Office of Education to provide grants and contracts to further the goals of the act. Activities that could be funded under the act fell into two categories:

> (1) Demonstration, developmental, and dissemination activities of national, statewide, or general significance; and

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[90] Pub. L. No. 90–247 § 702 (1968) (codified as amended at 20 U.S.C. 880(b) (1988)).

[91] 20 U.S.C. § 3282(a)(19) (1988).

[92] 20 U.S.C. §§ 1681–1688 (1988).

[93] 20 U.S.C. §§ 1681–1686.

[94] 42 U.S.C. §§ 2000e–2000e-16 (1988).

[95] *See* North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773, 779–84 (2d Cir. 1980), *aff'd*, North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982).

[96] Pub. L. No. 93–380 (codified at 20 U.S.C. §§ 3041–3047).

[97] Pub. L. No. 100–297, 102 Stat. 234 (codified as amended at 20 U.S.C. 3041).

(2) Assistance to help pay the costs of projects to provide equal educational opportunities to both sexes or the costs of complying with Title IX.[98]

Another disadvantaged group, children with disabilities, also began to seek Federal assistance to attain equal educational opportunity. Starting in 1966, Congress enacted provisions authorizing Federal aid to State and local education agencies to assist in the education of children with disabilities. In 1966, a Title VI was added to the Elementary and Secondary Education Act to provide basic State formula grants for the education of children with disabilities, and a Bureau of Education for the Handicapped was created within the Office of Education. Federal aid for the education of students with disabilities was enhanced further with the Education of the Handicapped Act in 1970 and the Education Amendments of 1974.[99] It was not until the mid-1970s, however, that Federal civil rights statutes protecting disabled students from discrimination—Section 504 of the Rehabilitation Act of 1973[100] and the Individuals with Disabilities Education Act of 1975[101] (formerly the Education of All Handicapped Children's Act)[102]—were passed.

In passing section 504, Congress defined the term disabled individual solely with relation to employment. However, the following year, Congress amended the definition of a disabled individual for purposes of section 504 and other provisions of Titles IV and V of the Rehabilitation Act so that it no longer was limited to employment.[103] For purposes of section 504, a disabled individual now is defined as "any person who (a) has a physical or mental impairment which substantially limits one or more of that person's major life activities, (b) has a record of such impairment, or (c) is regarded as having such an impairment."[104] With this amended definition, it became clear that section 504 includes "physically or mentally handicapped children who may be denied admission to federally supported school systems on the basis of their handicap."[105]

In 1975, Congress added to the protections for disabled students by passing the Individuals with Disabilities Education Act in response to concerns of a lack of appropriate educational opportunities for children with disabilities. Some of the concerns that led Congress to enact the law are set forth in the general provisions of the Individuals with Disabilities Education Act. Among those concerns were the following: in the mid-1970s more than half of the approximately 8 million children with disabilities in the Nation were not receiving appropriate educational services; 1 million of the Nation's disabled children were excluded entirely from public school educations; and many disabled children in regular school programs were educationally unsuccessful because their disabilities were undetected.[106] The purpose of the Individuals with Disabilities Education Act was stated as follows:

> [To] assure that all children with disabilities have available to them. . .a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.[107]

Because of the success of these civil rights statues, the Federal Government expanded its role as protector of educational opportunities for all students. The increased responsibilities fell on the overworked Office of Education. Since these minority groups were dependent upon the Federal Government to protect their educational rights, the authority as well as the scope of the Office of Education had to increase. The enforcement of the new civil rights laws required the Federal Government to take affirmative steps to implement changes in education policy. This realization was manifested in the Carter Administration with the creation of the Department of Education.

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[98]20 U.S.C. § 4003 (1988).

[99]U.S. Department of Education, Office of Special Education and Rehabilitative Services, *Summary of Existing Legislation Affecting People with Disabilities* (Washington, DC: Government Printing Office, 1992) pp. 16–17).

[100]Pub. L. No. 93–112, Title V § 504, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (1988 & Supp. V 1993)).

[101]Pub. L. No. 101–476, 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. §§ 1400–1485 (1988 & Supp. V 1993)).

[102]Pub. L. No. 94–142, 89 Stat. 275. Pub. L. No. 101–476 (1990) changed the name of the act, as well as making some substantive changes. This text will generally use the term IDEA when referencing court decisions and U.S. Department of Education memoranda and Policy Letters that predate the change in the title of the act, except in direct quotes. Similarly, since Pub. L. No. 101–476 changed the terminology in the act from "handicap" to "disability," the new terminology—such as "child with a disability" rather than "Handicapped child" generally will be used.

[103]Section 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. No. 93–51, 87 Stat. 99.

[104]34 C.F.R. § 104.3 (j) (1995).

[105]S. Rep. No. 93–1297, *reprinted in* 1974 U.S.C.C.A.N. 6388–89.

[106]20 U.S.C.A. §§ 1400 (b)(1),(3),(4) (1990).

[107]20 U.S.C.A. § 1400(c) (West Supp. 1991).

Creation of the Department of Education

When President James E. Carter came to office in January 1977, several components of the Federal Government were involved in education-related activities. The Office of Education within HEW, which was headed by the Commissioner of Education, had primary responsibility for administering Federal aid to education programs.[108] In addition to the Office of Education, HEW included:

- the National Institute of Education, which had been created in 1971 to enhance the Nation's educational research and development system;
- the National Center for Education Statistics that was responsible for collecting, maintaining, and disseminating education statistics; and
- the Fund for the Improvement of Secondary Education.[109]

All of these components of HEW's Education Division including the Office of Education, reported to the Assistant Secretary for Education. HEW's Office for Civil Rights conducted civil rights enforcement in education.[110]

Creating a cabinet level Department of Education was one of President Carter's campaign promises and a priority of his presidency. However, when he became president, the President of the United States did not have the authority to create a new department. It was not until later that year, with congressional passage of the Reorganization Act of 1977[111] that the President was given that authority.[112] Meanwhile, the Presidential Reorganization Program, a new unit within the Office of Management and Budget, was created to implement the president's reorganization plans, including the creation of a Department of Education. The Presidential Reorganization Program proceeded to consider several options for creating the new Department.[113]

In November 1977, the Presidential Reorganization Program presented three options to the President: the creation of a narrowly focused Department of Education; the creation of a broad-based Department of Education that would include other human development activities (e.g., Head Start, Child Nutrition, Science Education, and Indian Education) as well as education; or a restructuring of the existing HEW to include a strengthened Division of Education.[114] On April 14, 1978, President Carter decided to support the creation of a broad-based Department of Education.[115]

In Congress, debate about the Department of Education centered around which programs to include in a new department, as well as whether to create a Department of Education at all. On September 18, 1978, the Senate passed a bill to create a Department of Education by a margin of 72 to 11.[116] The House of Representatives, however, failed to pass a bill in 1978.[117] In January 1979, Senator Abe Ribicoff introduced a revised bill that provided for a narrower Department of Education. In particular, the bill excluded Head Start, Indian Schools, and Child Nutrition from being transferred to the new Department of Education.[118] This bill passed the Senate by a large margin in April 1979, and a similar bill passed the House in July 1979 by the narrow margin of 210 to 206.[119] The final bill passed both houses in September 1979.

President Carter signed the Department of Education Organization Act[120] into law on October 17, 1979.[121] The statute provided for a relatively narrow Department of Education that included the functions of the former HEW's Office of Education, National Institute of Education, National Institute of Education Statistics, and the education-related activities of the Department's Office for Civil Rights, but few other functions.[122] The statute created the positions of the Secretary and Under Secretary of Education, as well as the positions of: Assistant Secretary for Elementary and Secondary Education;

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[108]Radin and Hawley, *Creating the U.S. Department of Education*, pp. 28–32.
[109]Ibid.
[110]Ibid.
[111]Pub. L. No. 95–17, Stat. 626.
[112]Radin and Hawley, *Creating the U.S. Department of Education*, pp. 52–54, 57–58.
[113]Ibid., pp. 54–57.
[114]Ibid., pp. 70–73.
[115]Ibid., p. 109.
[116]Ibid., pp. 120–21.
[117]Ibid., pp. 126–28.
[118]Ibid., pp. 133–35.
[119]Ibid., p. 141.
[120]Pub. L. No. 96-88, Oct. 17, 1979 (codified as amended at 20 U.S.C. 3401 (1988)).
[121]Radin and Hawley, *Creating the U.S. Department of Education*, p. 149.
[122]Ibid., p. 189. Other functions transferred to the new department included: the Department of Defense's oversees dependents' schools; the Department of Health, Education, and Welfare's Rehabilitation Services Administration, which operated vocational rehabilitation programs; the Department of Justice's Law Enforcement Education Program; the Department of Labor's migrant education programs; the Department of Housing and Urban Development's college housing loan program; and two programs of the National Science Foundation. Skee Smith, "The U.S. Department of Education: Long-awaited Congressional Action Places the Secretary of Education in the President's Cabinet and Puts a National Concern into Sharp Focus, *American Education*, U.S. Department of Health, Education, and Welfare, Office of Education, November 1979.

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Assistant Secretary for Vocational and Adult Education; Assistant Secretary for Special Education and Rehabilitative Services; Assistant Secretary for Educational Research and Improvement; Assistant Secretary for Civil Rights; and General Counsel.[123] In addition, the statute created the following offices:

- Office for Civil Rights;[124]
- Office of Elementary and Secondary Education;[125]
- Office of Postsecondary Education;[126]
- Office of Vocational and Adult Education;[127]
- Office of Special Education and Rehabilitative Services;[128]
- Office of Educational Research and Improvement;[129]
- Office of Bilingual Education and Minority Languages Affairs;[130]
- Office of General Counsel;[131]
- Office of Inspector General.[132]

On October 30, 1979, President Carter announced that the first Secretary of Education would be Shirley Hufstedler, a Federal appeals court judge from California.[133] The Department of Education officially began operations on May 4, 1980.[134]

Department of Education Programs After 1980

In November 1980, shortly after the creation of the Department of Education, Ronald Reagan was elected President of the United States. President Reagan favored State and local control of education, rather than increased Federal involvement. One of his goals as President was the elimination of the Department of Education. Furthermore, as part of his larger "New Federalism" initiative, he sought to convert existing education assistance programs to block grants and give States authority over the use of these funds. President Reagan also consistently sought reduced budgets for the Department of Education.[135]

The Congress and the education lobby that had successfully pressed for the creation of the Department of Education in the late 1970s generally opposed President Reagan's education initiatives, and President Reagan was only partially successful in implementing his goals in the area of education. He did not succeed in eliminating the Department of Education, and Congress consistently appropriated substantially more funds for the Department than President Reagan requested.[136] Many of President Reagan's elementary and education proposals, such as the school voucher proposal to promote school choice and a proposal to eliminate Federal support for vocational education, never were implemented.[137]

President Reagan, however, did have some successes: he was able to convert several education programs into block grants, and, despite congressional support for education, funding for the Department of Education fell, in real terms, by 3.25 percent between 1980 and 1988.[138] In 1981, President Reagan proposed consolidating all Federal elementary and secondary assistance programs into two block grants over which States would be able to set spending priorities. However, when finally enacted as part of the Omnibus Reconciliation Act of 1982, the Education Consolidation and Improvement Act of 1981 created an education block grant program that left intact the major Federal education assistance programs created in the 1960s, such as Title I compensatory education funds, bilingual education funds, funds for the education of disabled children, and vocational education funds.[139] In real terms, overall Federal support for elementary and secondary education fell by 28 percent between 1980 and 1988. Funding for compensatory education (then chapter 1, now Title I) fell by 12 percent, and funding for bilingual educational fell by 25 percent. Funding for civil rights enforcement fell by 42 percent.[140]

Two especially noteworthy developments occurred during the Reagan administration. First, President Reagan's first Secretary of Education, Terrel Bell convened a National Commission on Excellence in Education. In 1983, the National Commission released its report, *A Nation at Risk*,[141] directing national attention to the declining quality of American education.[142] The report

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[123]Pub. L. No. 96-88 § 202.
[124]20 U.S.C. 3413 (1988).
[125]20 U.S.C. 3414 (1988).
[126]20 U.S.C. 3415 (1988).
[127]20 U.S.C. 3416 (1988).
[128]20 U.S.C. 3417 (1988).
[129]20 U.S.C. 3419 (1988).
[130]20 U.S.C. 3420 (1988).
[131]20 U.S.C. 3421 (1988).
[132]20 U.S.C. 3422 (1988).
[133]Radin and Hawley, *Creating the U.S. Department of Education*, p. 153.
[134]Ibid., p. 187.
[135]*See* Deborah A. Verstegen, "Education Fiscal Policy in the Reagan Administration," *Educational Evaluation and Policy Analysis*, vol. 12, no. 4 (Winter 1990) (hereafter cited as Verstegen, "Education Fiscal Policy").
[136]Ibid., pp. 78–79.
[137]Verstegen, "Education Fiscal Policy," pp. 364–65.
[138]Ibid., p. 78.
[139]*See* ibid., pp. 8–9.
[140]Verstegen, "Education Fiscal Policy," pp. 367–68.
[141]National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform*, a Report to the Nation and the Secretary of Education, April 1983.
[142]The report presented numerous measures indicating the declining educational quality and argued persuasively that excellence in education was essential to America's future, not just because

brought education to the forefront of national debate, spawned widespread calls for school reform, and ultimately led to the adoption of national education goals under the administration of President George Bush and the enactment of the Goals 2000 Act under the administration of President William Clinton.

Second, Congress passed the Hawkins-Stafford School Improvement Act of 1988.[143] The Hawkins-Stafford Act reauthorized the Elementary and Secondary Education Act of 1965. Essentially, it continued the previous Federal commitment to elementary and secondary education programs, but contained some significant amendments, including some concessions to President Reagan. The formula for Title I compensatory education was altered to target concentration grants to rural as opposed to urban school districts, and the Bilingual Education Act was amended to ensure that a higher percentage of Federal bilingual education funds would be spent on alternative education programs, such as English as a Second Language programs or structured immersion programs, rather than full immersion programs. The act created the Even Start[144] and Star Schools[145] programs, provided dropout prevention funds for high school students and new gifted and talented funds.[146]

As a presidential candidate in 1988, George Bush campaigned in part on his intention to become an "education president." Once elected, he convened a conference of America's Governors to discuss the problems of American education.

The National Governor's Association and President Bush agreed upon six major national education goals for the year 2000 that were developed at this conference:[147]

(1) All children in America will start school ready to learn.

(2) The high school graduation rate will increase to at least 90 percent.

(3) American students will leave grades 4, 8, and 12 having demonstrated competency in challenging subject matter including English, mathematics, science, history, and geography; and every school in America will ensure that all students learn to use their minds well, so they may be prepared for responsible citizenship, further learning, and productive employment in our modern economy.

(4) U.S. students will be first in the world in science and mathematics achievement.

(5) Every adult American will be literate and will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship.

(6) Every school in America will be free of drugs and violence and will offer a disciplined environment conducive to learning.[148]

During President Bush's administration, under the leadership of Secretary of Education Lamar Alexander, the Department of Education focused on developing and implementing an education strategy, *America 2000*, aimed at achieving the Nation's education goals.[149] Out of the *America 2000* strategy came several education initiatives: the development of national education standards; the designation of America 2000 Communities; and the creation of a private, nonprofit organization, the New American Schools Development Corporation, to raise money and fund experimental schools.

"learning is the indispensable investment required for success in the 'information age' we are entering. . ." but also because a "high level of shared education is essential to a free, democratic society and to the fostering of a common culture, especially in a country that prides itself on pluralism and individual freedom." Ibid., p. 7. The report also called for fundamental education reform to promote high-quality education, including a renewed emphasis on basic subjects, rigorous and measurable standards, more time spent at school, better teacher preparation and motivation, and national leadership and fiscal support of education. Ibid., pp. 24–33.

[143]Pub. L. No. 100–297, Stat. 130.

[144]In 1995, no funds were requested under this program name. Under the administration's fiscal year 1996 budget request, Even Start is proposed for consolidation with Adult Education and Family Literacy programs in the Vocational and Adult Education Account. DOEd reports that combined funding streams for adult education and family literacy programs will give States the flexibility to operate programs that address learners' needs more comprehensively. *See* Hearings, p. 690.

[145]Star Schools is a program that provides funds for local, statewide, or multistate entities to establish demonstration programs to (a) improve instruction for all students in mathematics, science, foreign language, and other subjects such as literacy skills and vocational education and (b) improve access by underserved populations (such as the illiterate, limited-English-proficient students, and individuals with disabilities) to high-quality mathematics and science academic programs. *Catalog of Domestic Assistance*, p. 914. Overall, grant funds are intended to establish powerful new learning opportunities for students in schools that could not otherwise provide this instruction. All prospective grantees must determine in advance (during application stage) the intended contributions of their project toward the following: achieving the National Education Goals, providing students with opportunities to learn challenging State standards, assisting with State and local school modifications, and helping build a high-quality system of lifelong learning. *See* DOEd FY 1996 Budget, pp. 81–82.

[146]Verstegen, "Education Fiscal Policy," p. 365.

[147]Terrel H. Bell and Donna L. Elmquist, *How to Shape Up Our Nation's Schools: Three Crucial Steps for Renewing American Education* (Salt Lake City: Terrel Bell and Associates, 1991), p. vii.

[148]President George Bush, *America 2000: An Education Strategy*, Apr. 18, 1991, p. 9.

[149]Ibid.

When William J. Clinton became President in 1993, the focus of the effort to achieve the national education goals changed. The Government ceased emphasizing the role of school reform supported by the New American Schools Development Corporation. In 1994, Congress passed the Goals 2000: Educate America Act which had a greater emphasis on systemic school reform—reform of the entire Federal, State, and local education system.[150]

The Goals 2000 Act adopted the six national education goals developed under the Bush administration with minor modifications and added two additional goals. The new goals were:

- The Nation's teaching force will have access to programs for the continued improvement of their professional skills and the opportunity to acquire the knowledge and skills needed to instruct and prepare all American students for the next century; and
- Every school will promote partnerships that will increase parental involvement and participation in promoting the social, emotional, and academic growth of children.

Improving America's Schools Act;
Goals 2000 Act[151]

The list of subjects addressed in the goal for students leaving grades 4, 8, and 12 was expanded to include foreign languages, civics and government, economics, and arts, in addition to English, mathematics, science, history, and geography.[152] The goal on school safety also was modified slightly.[153]

To facilitate achievement of the national education goals, Title II of the Goals 2000 Act created the National Education Goals Panel with a mandate to report on progress towards meeting goals; and to submit nominations to and review national standards certified by the National Education Standards and Improvement Council, also created by the act.[154] The National Education Standards and Improvement Council was given the responsibility to certify voluntary national "opportunity to learn" standards, to be developed by consortia composed of State and local policymakers, teachers, parents, business representatives, school finance experts, and experts in the education of at-risk students. The act requires that one-third of the members of the consortia be experts in the education of low-income, minority, limited-English-proficient,or disabled students, and that the membership generally reflect the racial, ethnic, and gender diversity of the United States.[155] Title III of the act authorizes a formula grants program to assist systemic education reform at the State and local level.[156] The act also created an Office of Educational Technology within the Department of Education[157] and authorized and made major changes to the Department of Education's Office of Educational Research and Improvement.[158]

In describing the Goals 2000 Act, President Clinton's Secretary of Education Richard W. Riley has stated that it "represents a redefined and more balanced Federal role in education" because it attempts to promote a coherent Federal education policy of encouraging systemic education reform.[159] Nevertheless, Secretary Riley stressed that Federal education policy's traditional goal of promoting equal educational opportunity remains a fundamental aspect of Federal policy under the Goals 2000 Act:

> There is a clear relationship between our efforts to enact and implement the Goals 2000 Act and our continuing efforts to achieve equity in education through renewed dedication to the principles of *Brown v. Board of Education*. . . .
>
> We cannot allow the tyranny of low expectations to become the segregation of the 1990s. This is why Goals 2000 is the center of all our efforts to fulfill the promise of *Brown*.[160]

Four months after the Goals 2000 Act was signed into law, Congress enacted the Improving America's Schools Act of 1994,[161] which authorized the Elementary and Secondary Education Act until 1999. The Improving America's Schools Act made modifications to many elementary and secondary education programs with the

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[150]James B. Stedman, *Goals 2000: Overview and Analysis* (Washington, D.C.: Congressional Research Service, 1994), CRS Report 94-490-EPW, p. 37.

[151]20 U.S.C. 5812 (Supp. V 1993).

[152]As stated in the Goals 2000 Act, the goal reads: "All students will leave grades 4, 8, and 12 having demonstrated competency over challenging subject matter, including English, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography, and every school in America will ensure that all students learn to use their minds well, so they may be prepared for responsible citizenship, further learning, and productive employment in our Nation's modern economy." Title I, Goals 2000 Act, Pub. L. No. 103-227 (1993).

[153]As stated in the Goals 2000 Act, the goal reads: "Every school in the United States will be free of drugs, violence, and the unauthorized presence of firearms and alcohol and will offer a disciplined environment conducive to learning." Title I, Goals 2000 Act, Pub. L. No. 103-227 (1988).

[154]20 U.S.C. §§ 5821-5871 (Supp. V 1993).

[155]*See* Stedman, pp. 4-6.

[156]20 U.S.C. § 5882 (Supp. V 1993).

[157]20 U.S.C. § 3425 (Supp. V 1993).

[158]20 U.S.C. §§ 6001-6051 (Supp. V 1993). The act's changes to the Office of Educational Research and Improvement are discussed in chap. 3.

[159]Riley, "Redefining the Federal Role in Education," p. 296.

[160]Ibid., pp. 352-53.

[161]20 U.S.C. § 6301 (Supp. 1994).

aim of building linkages between existing programs and the national education goals and systemic reform strategy embraced by the Goals 2000 Act, and giving more flexibility to State and local education agencies in their administration of Federal education programs.[162]

The Improving America's Schools Act also altered the allocation formula for title I funds to increase slightly the funds going to the most needy students and schools. Based on recommendations by the Federal Chapter 1 Commission, President Clinton had proposed changing the allocation formula more dramatically, to "deliver more dollars to the neediest students in the neediest schools in the neediest districts."[163] The administration proposal was to reserve 50 percent of Title I funds for concentration grants to districts with a poverty rate above 18 percent, or with more than 6,500 poor children. Under the administration proposal, some school districts stood to gain and others to lose large amounts of title I funding.[164] However, as finally enacted, the bill made only minor changes to the title I allocation formula. Under the law, only funds above and beyond the fiscal year 1995 title I appropriation would be subject to greater targeting.[165]

Conclusion

The Federal role in education has only gradually evolved over the years. Nevertheless, it has prompted many improvements in the Nation's public elementary and secondary school systems and in the educational opportunities available to children and youth. It has achieved this largely through the creation of numerous financial assistance programs. For example, although federally funded programs, like Title I, have received scrutiny over the years due to slow improvements, excessive testing, or rigid regulations,[166] the program has remained funded because it has had success with improving the achievement levels of poor and minority children.[167] Poor and minority children have improved their achievement scores while other children have remained at the same level. In addition, many policymakers have recognized that the number of poor students, especially from minority backgrounds, will increase by the end of the decade; thus increasing the need for continued title I funding.[168]

"The numbers and proportions of poor students are growing in society, and it is becoming more self-evident that the prosperity and well-being of the country will increasingly depend on their ability to succeed."[169]

The Federal role also has improved education by advancing the notion of equal opportunity. Through creation and enforcement of title IV, title VI, title IX, section 504, and the Individuals with Disabilities Education Act, the Federal Government has transformed the principle of nondiscrimination into a legal defensible right. Congress, our Presidents, the Department of Education, and Federal courts each played a hand in advancing this right. For example, the Supreme Court's decision in *Brown* was only the beginning of a role that Federal courts would play in defining the educational rights of disenfranchised groups.

In viewing the combined role that the Federal Government has played in education through financial programs and civil rights, it largely has influenced the evolution and meaning of equal educational opportunity. There has been no Federal effort to offer a single, formal definition to "equal educational opportunity." As a result, there is no single cohesive guideline available for ensuring equal educational opportunity. However, the principles and purposes underlying Federal education programs and civil rights laws, regulations, and policies have provided some insight into the meaning of the concept. For example, among some of the basic ideas, reflected in civil rights and Federal education programs, that help to define equal educational opportunity include equal access, nondiscrimination, and adequacy of educational facilities and resources.

Over the years, the Federal role in education has led to improvements in education and advancement of the goal of equal educational opportunity. Responsibility for education properly remains with State and local governments. However, the Federal Government has a necessary and continuing role to play in education, enforcing nondiscrimination laws and in deciding when to distribute Federal appropriations to address the special needs of students.

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[162]James B. Stedman, *Improving America's Schools Act: An Overview of P.L. 103-382* (Washington, D.C.: Congressional Research Service, 1994), CRS Report 94-872 EPW, pp. 1-2 (hereafter cited as Stedman, *Improving America's Schools Act*).

[163]U.S. Department of Education, *Improving America's Schools Act of 1993: Reauthorization of the Elementary and Secondary Education Act and Amendment to Other Acts*, Sept. 13, 1993, p. 18.

[164]Ibid.

[165]Stedman, *Improving America's Schools Act*, pp. 3-6.

[166]John F. Jennings, "A View From Congress," *Educational Evaluation and Policy Analysis*, vol. 13, no. 4, pp. 335-38 (hereafter cited as "A View From Congress").

[167]Ibid.

[168]"A Vew From Congress," p. 336.

[169]"A View From Congress," p. 338.

Chapter 3

The U.S. Department of Education, Offices, and Programs in the 1990s

Statistics show that there has been some progress in providing equal opportunity for education since the civil rights laws were enacted, however many students in the Nation's elementary and secondary schools face barriers and inequities that prevent them from having an equal opportunity to access resources and participate in all education programs (e.g., subjects, extracurricular activities), maximizing their learning potential, and attaining an overall high-quality education. Barriers that cause discrimination can be based on national origin, disability, gender, and/or race/ethnicity. The U.S. Department of Education (DOEd) has a responsibility to address persistent inequities that can hinder a student's achievement in the classroom during the elementary and secondary school years, prevent adequate preparation for higher education, inhibit productivity in the labor force (and curtail earnings), and ultimately prevent the Nation from capitalizing on all of its citizens' talents.

In general, this chapter describes DOEd's responsibilities and efforts (programmatic and financial) related to promoting equal educational opportunity for all students in elementary and secondary education programs—endeavors that focus on preventing and/or remediating potential discrimination based on barriers related to disability, national origin, gender, and race/ethnicity.[1] The chapter examines four offices within DOEd that promote equal educational opportunity in elementary and secondary education: Office of Special Education and Rehabilitation Services (OSERS), Office of Bilingual Education and Minority Language Affairs (OBEMLA), Office of Educational Research and Improvement (OERI), and the Office of Elementary and Secondary Education (OESE).[2] Some of these issues, such as the complexity and expense of language assistance programs, are considered controversial. This report addresses those issues insofar as they are part of the enforcement effort. More specifically, this chapter describes:

- The educational programs that provide various forms of assistance to children with special needs that could affect their extent and quality of educational attainment and achievement;
- DOEd endeavors to assist students with special needs and who are more likely to face discrimination in their access to and participation in all academic and extracurricular activities; and
- The provision and implementation of programs and services (such as Early Education for Children for Children with Disabilities, Programs for Children with Serious Emotional Disturbance, Bilingual Education or English as a Second Language, Star Schools Program for Distance Learning,[3] and Title I grants to States) to ensure equal educational opportunities for students with special needs, including students with disabilities, limited English proficiency, or socioeconomic disadvantages.

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[1]This chapter does not represent an evaluation or assessment of the Department of Education's program offices, but, instead, describes their activities and programs related to the Commission's selected focus issues and factors and the civil rights activities of DOEd's Office for Civil Rights.

[2]Although it will not be discussed in detail in this report, the Office of Postsecondary Education, as DOEd's largest division, is headed by the Assistant Secretary for Postsecondary Education. Stephen Sniegoski, *Know Your Government: The Department of Education* (New York: Chelsea House, 1988), p. 71 (hereafter cited as Sniegoski, *Know Your Government*). The office distributes almost half of the agency's annual budget. Major program units include the Office of Student Financial Assistance, which in 1995 granted more than $12 billion in aid to students attending colleges and universities; and the Fund for the Improvement of Postsecondary Education, which finances innovative projects in teacher education and curriculum development. Stephen Sniegoski, *Know Your Government*, p. 71; U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information*, no date, p. 51.

[3]The Star Schools Distance Learning Projects utilize satellite delivery of live, interactive television programs, on-line computer support, and other advanced technologies, so that students, teachers, administrators, parents, and community members in rural, urban, and suburban areas across the Nation can interact simultaneously and advance educationally, particularly in mathematics and science. *See* Carla Lane and Sheila Cassidy, *Star Schools Projects: Distance Learning Model Practices* (San Francisco: Far West Laboratory [year]), p. 1.

Overview of the U.S. Department of Education

Congress established DOEd in 1980 as a cabinet-level agency,[4] based on a comprehensive set of purposes. Specifically, Congress sought to:

- Strengthen the Federal commitment to ensuring access to equal educational opportunity for every student;
- Supplement and complement efforts by States, local school systems, education institutions, the private sector, nonprofit entities, and parents and students to improve education quality;
- Encourage increased involvement of the public, parents, and students in Federal education programs; and
- Promote improvements in quality and usefulness of education through federally funded research, evaluation, and sharing of information.[5]

Currently, DOEd is headed by Secretary of Education, Richard W. Riley.[6] DOEd fulfills its responsibilities with an appropriation from Congress. In 1992, DOEd had an appropriation of $31.8 billion[7] and 4,859 full-time equivalents (FTE).[8] DOEd had virtually the same size staff and budget (4,876 FTE and $31.3 billion) the following year.[9] In 1994, funding dropped to $27.4 billion (and a professional and support staff of 4,772).[10] In 1995, DOEd's budget climbed to approximately $32 billion and employed 5,131 FTEs.[11] The number of staff at DOEd has fallen substantially from the approximately 7,700 employed in 1980 when DOEd became a separate cabinet-level agency.[12]

Under DOEd's Streamlining Plan, DOEd's budget and employment are expected to decrease between fiscal year 1995 and fiscal year 1999.[13] As a result, DOEd's fiscal year 1996 budget request is $30 billion, with 5,060 FTEs.[14] By fiscal year 1999, DOEd anticipates having 329 fewer FTEs than in fiscal year 1995.[15]

DOEd currently administers 240 different education assistance programs[16] that affect over 60 million students attending 109,000 elementary and secondary schools in 15,000 school districts, and 10,000 postsecondary institutions.[17] This is 85 more programs than when DOEd was created in 1980 with 155 programs.[18] Peak growth oc-

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[4]Prior to 1980, Federal education programs were administered under the Education Division of the former U.S. Department of Health, Education, and Welfare (HEW). Frustrated that education policy was a low priority for the overwhelmed HEW, Congress established the U.S. Department of Education (DOEd) as a Cabinet-level agency to elevate education to the highest level of government. From DOEd's inception, providing equal educational opportunity was a top priority for Congress. The Committee on Governmental Affairs, to whom consideration of the bill to establish DOEd was delegated, stated that a department of education should serve, inter alia:

"(2) To continue and strengthen the Federal commitment to ensuring access by every individual to equal educational opportunities. Equal educational opportunity has been and must remain a major educational goal of the Federal government. The Federal government has acted to ensure equality of educational opportunity for every American regardless of race, sex, age, ethnic heritage, economic disadvantage, or handicapped condition: . . ."

See S. Rep. No. 96–49, 96th Cong., 1st sess. 1514 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1514, 1525–26.

[5]Additional DOEd purposes are to improve coordination of Federal education programs; reduce unnecessary burdens on recipients of Federal funds in order to improve management and efficiency of Federal education activities; and increase accountability of Federal education programs to the President, Congress, and the public. *See* Pub. L. No. 96–88, 93 Stat. 669 (codified as amended at 20 U.S.C. § 3401 (1988)).

[6]U.S. Department of Education, *ED Facts: Information about the U.S. Department of Education*, [year], p. 2. The Secretary of Education advises the President on education plans, policies, and programs of the Federal Government. The Secretary also fulfills certain Federal responsibilities for four federally aided corporations: the American Printing House for the Blind, Gallaudet University, Howard University, and the National Technical Institute for the Deaf. The Deputy Secretary, the Assistant Secretaries, the Inspector General, the General Counsel, the Chief Financial Officer, and the Under Secretary are the principal officers who assist the Secretary in the overall management of the Department. Office of the Federal Register, National Archives and Records Administration, *The United States Government Manual 1995/1996*, p. 252.

[7]Ray Hamilton, Budget Officer, DOEd Budget Service/Policies and Procedures, telephone interview, Jan. 26, 1996, p. 2; and DOEd, *Congressional Action on Fiscal Year Budget*, [years], p. #.

[8]Linda DelPiano, Branch Chief, DOEd Budget Service/Administrative Budget and Control Board, telephone interview, Jan. 26, 1996, p. 2.

[9]Ibid.

[10]Ibid.

[11]U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information*, no date, pp. 3, 87.

[12]Ibid., p. 89.

[13]Ibid., no date, p. 88.

[14]Ibid., no date, pp. 3, 88.

[15]Ibid., no date, p. 90.

[16]The term funded "program" has no standard definition and is used to refer to any funded activity that has had a specific appropriation. *See* Paul Irwin, *Elementary and Secondary Education Act of 1965: FY 1993 Guide to Programs* (Washington, DC: Congressional Research Service, Library of Congress, November 1992), p. 3.

[17]U.S. Departments of Labor, Health and Human Services, Education, and Related Agencies, *Hearings on Appropriations before the Subcommittee on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Appropriations Committee*, 104th Cong., 1st Sess. 67 (1995), pp. 19 and 66 (hereafter cited as *Hearings on Appropriations*).

[18]U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information*, no date, p. 89.

curred between 1986 and 1988, when DOEd established 50 additional programs, becoming responsible for administering 200 separate activities.[19]

Mission and Responsibilities

DOEd has four major responsibilities:

1) to establish policies relating to Federal financial aid for education, to administer the distribution of those funds, and to monitor their use;

2) to collect data and oversee research on America's schools and to disseminate this information to educators and the general public;

3) to identify the major issues and problems in education and to focus national attention on them; and

4) to enforce Federal statutes prohibiting discrimination in programs and activities receiving Federal funds and to ensure equal access to education for every individual.[20]

To guide DOEd offices in fulfilling their responsibilities, DOEd adopted a Strategic Plan in 1994 that defines clearly DOEd's mission and develops a strategy for achieving them. Under the Strategic Plan, DOEd's mission[21] was to "ensure equal access to education and to promote educational excellence throughout the Nation."[22] DOEd's role is to provide leadership and support to State and local education agencies.[23] The Strategic Plan sets three goals for DOEd: (1) to achieve the eight National Education Goals by the year 2000,[24] (2) to ensure equity, and (3) to build partnerships with customers.[25]

Organization

The Secretary of Education is responsible for overall direction, supervision, and coordination of all activities of DOEd and advises the President on Federal policies, programs, and activities related to education in the United States.[26] The Deputy Secretary, the Assistant Secretaries, the inspector general, the general counsel, the chief financial officer, and the Under Secretary assist the Secretary in the discharge of these duties and responsibilities.[27]

DOEd is comprised of 6 program offices and 12 staff offices. The program offices include the following:

- Office of Postsecondary Education
- Office of Elementary and Secondary Education
- Office of Bilingual Education and Minority Languages Affairs
- Office of Special Education and Rehabilitative Services
- Office of Vocational and Adult Education Services
- Office of Educational Research and Improvement

The staff offices consist of the following:

- Office of the Secretary
- Office of the Deputy Secretary
- Office for Civil Rights
- Office of the General Counsel
- Office of the Inspector General
- Office of Public Affairs
- Office of Policy and Planning
- Office of Intergovernmentaland Interagency Affairs
- Office of Legislation and Congressional Affairs
- Office of Human Resources and Administration
- Office of Management and Budget/Chief Financial Officer
- Advisory Councils

The Oversight/Enforcement offices consists of the following:

- Office for Civil Rights
- Office of Inspector General.

DOEd is divided into headquarters and regional offices. Headquarters staff, comprising 84 percent of FTEs, develop policy and strategic planning for DOEd programs and provide administrative support services for both headquarters and regional staff.[28]

With one exception, each of the offices is under the supervision of an assistant Secretary. The Office of Public Affairs and Bilingual Education and Minority Languages, is led by a director.[29] Office heads serve as principal advisers to the Secretary on all matters related to a

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[19]Ibid.

[20]U.S. Department of Education, *ED Facts: Information about the U.S. Department of Education*, [year], p. 3.

[21]According to the Strategic Plan, DOEd's mission is to ensure excellence in education, to raise standards of academic learning, and to provide all students access to a high-quality education. U.S. Department of Education, *Strategic Plan for the U.S. Department of Education: Working Document* (December 1994), p. 3.

[22]U.S. Department of Education, *Strategic Plan for the U.S. Department of Education: Working Document* (December 1994), p. 2 (hereafter cited as DOEd, *Strategic Plan*).

[23]Ibid., p. 3.

[24]Ibid., p. 1. *See* Goals 2000: Educate America Act, Pub. L. No. 103–227, 108 Stat. 125. For a further discussion of the National Education Goals, see chapter 2.

[25]DOEd, *Strategic Plan*, p. 7.

[26]U.S. Department of Education, Administrative Communications System, part B, vol. 1, *Mission and Organization Manual*, vol. 1, part B (1993) p. 1 (hereafter cited as *1993 Mission Manual*).

[27]Ibid.

[28]The remaining 16 percent of FTEs are assigned to the regional offices. Linda DelPiano, Branch Chief, DOEd Budget Service/Administrative Budget and Control Board, telephone interview, Jan. 26, 1996, p. 2.

[29]*See* DOEd Organizational Chart.

specialized aspect of policy operations or education and training opportunities.[30] Each of the operating components has its own budget and specialized staff. Each office's policies, programs, and activities related to their distinct mission affects the offices' structure/composition, number and type of staff, and overall visibility.[31]

In addition to pursing distinct responsibilities, offices also have varying structures. For instance, the Office of Educational Research and Improvement is composed of five research institutes: Library Programs and the National Library of Education, Media and Information Services, Office of Reform Assistance and Dissemination, and the National Center for Education Statistics (which is comprised of numerous divisions such as Education Assessment, Elementary/Secondary Education, and Data Development).[32] In contrast, the much smaller Office of Bilingual Education and Minority Language Affairs (OBEMLA) is currently composed of three State cluster offices. Until 1996, OBEMLA consisted of two main divisions (National Programs and State and Local Education Agency Programs), as well as a research and evaluation staff.[33]

Office of Special Education and Rehabilitative Services

The Office of Special Education and Rehabilitative Services (OSERS) was created in 1966 as the Bureau of Education for the Handicapped[34] within DOEd's predecessor, the Office of Education in the Department of Health, Education, and Welfare. It is responsible for education programs that serve the needs of children, youth, and adults with disabilities. Some of the key elementary and secondary education programs administered by OSERS are:

- Early Education for Children with Disabilities
- Program for Children with Serious Emotional Disturbance (SED)[35]
- Grants to States: "The Part B Program of IDEA"
- Handicapped Regional Resources and Federal Centers Program
- Services for Children with Deaf-Blindness
- Technology, Educational Media, and Materials for Individuals with Disabilities

[30] *1993 Mission Manual*, p. 1.

[31] Ibid.

[32] *See* current OERI Organizational Chart, reflecting the 1995–1996 reorganization.

[33] *See* 1995 OBEMLA Organization Chart.

[34] Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89–750, 80 Stat. 1191. *See* J. Johnson, et al. *Introductions to the Foundations of American Education* (Boston: Allyn and Bacon, 1991), p. 391.

[35] Defined in 34 C.F.R. § 300.7(b)(9) (1995).

Altogether, OSERS programs reach over 5 million children and youth across the country, as well as 1 million adults.[36] In fiscal year 1995, OSERS' appropriation was approximately $5.8 billion, up from $5.0 billion in 1992.[37] OSERS had 354 FTEs, a decline of 53 since 1992.[38]

OSERS Mission and Responsibilities

The programs supported by OSERS assist in educating infants and children with specified identified disabilities, such as behavioral, emotional, cognitive, speech-related, orthopedic, sensory-motor, or other impairments, and who have more comprehensive education and medical needs than students in a regular education classroom.[39] OSERS' responsibilities include meeting the needs and developing the full potential of children with disabilities through the provision of special education programs and services; and disseminating information about services, programs, and laws affecting persons who are disabled.[40]

OSERS' service delivery role is accompanied by research endeavors that aim to (a) promote understanding of the origins, management, and treatment of a wide range of disorders; and (b) acquire additional knowledge

[36] U.S. Department of Education, *Information about the Office of Special Education and Rehabilitative Services* (1994), p. 2.

[37] DOEd, *Congressional Action on Fiscal Year 1992 Budget* (Aug. 9, 1992), p.1.

[38] Linda DelPiano, Branch Chief, DOEd Budget Service/Administrative Budget and Control Board, telephone interview, Jan. 26, 1996, p. 2.

[39] Steven Aleman, *Individuals with Disabilities Education Act: Reauthorization Overview* (Washington, DC: Congressional Research Service, Library of Congress, Nov. 3, 1995), pp. 1–5 (hereafter cited as Aleman, *IDEA*).

[40] *1992 Mission Manual OSERS*, p. 1. Additional responsibilities include providing resources to rehabilitating youth and adults with disabilities, so that their dependency can be reduced and their productive capacity can be enhanced; and increasing knowledge about, fostering innovation in, and improving the delivery of services for persons with disabilities through the performance or through provision of independent living and vocational rehabilitation services. *See 1992 Mission Manual OSERS*, p. 1. OSERS also provides information and technical assistance to State and local entities on best practices and model programs utilized by OSERS' non-Federal partners to improve the outcomes and efficiency of their service programs. *See Hearings on Appropriations* (1995), p. 611. To support its information and technical assistance functions, OSERS provides grants that fund a number of information clearinghouses, including the National Information Center for Children and Youth with Disabilities; the HEATH Resource Center, a national clearinghouse on postsecondary education for individuals with disabilities; the National Rehabilitation Information Center; the National Clearinghouse for Professions in Special Education; and the ERIC Clearinghouse on Disabilities and Gifted Education. U.S. Department of Education, Office of Special Education and Rehabilitative Services, *Clearinghouse on Disability Information*.

about the biological, psychosocial, and socioeconomic implications of disabilities on the persons affected and their families.

Major statutes that OSERS has some responsibility for include the following:

- Section 504 of the Rehabilitation Act of 1973,[41] which broadly guarantees individuals with disabilities the right to benefit from any federally assisted or sponsored program or activity, including education;[42]
- Equal Educational Opportunities Act of 1974,[43] which prohibits States from excluding any individual from participating in a public education program or activity;[44] and
- Education for All Handicapped Children Act of 1975,[45] renamed in 1990 as Individuals with Disabilities Education Act (IDEA),[46] which entitles students with disabilities to "free and appropriate public education"[47] with full educational opportunities provided in the least isolated and restrictive environment possible.[48]

The functions of the Office for Civil Rights and OSERS and their responsibilities under section 504 and the IDEA, respectively, are separate and distinct.[49] However, because section 504 regulations and the IDEA share similar concepts, such as the view that all children enrolled in school are entitled to a free appropriate public education, some coordination is necessary between the two offices.[50] Recognizing this need for coordination, OSERS and the Office for Civil Rights operate under a memorandum of understanding, which was instituted on July 29, 1987, that formally outlines the coordination between these two offices.[51]

OSERS and OCR maintain an active relationship, and they follow the memorandum of understanding closely.[52] Under the agreement, OSERS and OCR "may undertake jointly, by mutual agreement, any or all of the following activities:

1. technical assistance;
2. investigation of any education agency;
3. the issuance of findings under the IDEA and section 504;
4. the negotiations of remedies for violations found;
5. the monitoring of compliance plans; and
6. appropriate enforcement proceedings."[53]

The memorandum of understanding further specifies that "[w]hen policy is being formulated, by either OCR or OSERS, on any issue concerning the provision of a free appropriate public education, every effort will be made to consult on the issue prior to issuance of the policy."[54] In practice, the Office of Special Education Programs (OSEP) within OSERS has worked closely with OCR when developing policy,[55] and it has issued joint policy memoranda and policy letters with OCR.[56]

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[41]Pub. L. No. 93–112, 87 Stat. 355.

[42]DOEd's Office for Civil Rights' Policy Enforcement and Program Service is responsible for compliance and enforcement matters for Section 504. *See 1992 Mission Manual OCR/PEPS*, p. 2. OSERS has liaison responsibilities.

[43]Pub. L. 93–380, 88 Stat. 514.

[44]Although the U.S. Department of Justice has primary compliance and enforcement responsibilities for this act, OSERS assists the Office for Civil Rights with its liaison responsibilities.

[45]Pub L. No. 94–142, 89 Stat. 773 (as amended), renamed the Individuals with Disabilities Education Act, Pub. L. No. 101–476,104 Stat. 1142 (codified as amended at 20 U.S.C. §§ 1400–1485 (1994)).

[46]Pub. L. No. 101–476, 104 Stat. 1142 (codified as amended at 20 U.S.C. §§ 1400–1485 (1994)).

[47]Defined in 20 U.S.C. § 1401(a)(18) (1994).

[48]Defined in 20 U.S.C. § 1412 (1994).

[49]*See* chap. 5, for a further discussion of the distinctions in civil rights responsibilities between OSERS and the Office for Civil Rights.

[50]The functions of the Office for Civil Rights and OSERS in relation to section 504 and IDEA will be discussed in volume 2 in the Equal Educational Opportunity report series: *Equal Educational Opportunity for Students with Disabilities*.

[51]*See* Madeleine S. Will, Assistant Secretary, Office of Special Education and Rehabilitative Services, and LeGree S. Daniels, Assistant Secretary, Office for Civil Rights, Memorandum of Understanding Between the Office for Civil Rights and the Office of Special Education and Rehabilitative Services, July 29, 1987, Policy Codification System Document No. 152 (hereafter cited as OSERS–OCR, Memorandum of Understanding).

[52]Jean Peelen, Enforcement Director, Office for Civil Rights, DC Metro Office, U.S. Department of Education, interview in Washington, DC, May 28, 1996, p. 2.

[53]OSERS–OCR, Memorandum of Understanding, p. 2.

[54]Ibid.

[55]According to Jean Peelen, OCR works closely with the Office of Special Education Programs, particularly on the issue of minorities in special education, and OCR often taps into OSEP's resources. Jean Peelen, Enforcement Director, Office for Civil Rights, DC Metro Office, U.S. Department of Education, interview in Washington, DC, May 28, 1996, p. 2 (hereafter cited as Peelen interview) (Ms. Peelen is also the former issue coordinator for minorities in special education and former director of the Elementary and Secondary Education Policy Division in OCR's former Planning, Analysis, and Systems Service.).

[56]*See* Robert R. Davila, Assistant Secretary, Office of Special Education and Rehabilitative Services, Michael L. Williams, Assistant Secretary, Office for Civil Rights, and John T. MacDonald, Assistant Secretary, Office of Elementary and Secondary Education, U.S. Department of Education, joint policy memorandum, Sept. 16, 1991, 18 IDELR 116–19; Thomas Hehir, Director, Office of Special Programs, and Jeannette J. Lim, Director, Policy, Enforcement and Program Service, Office for Civil Rights, U.S. Department of

The memorandum of understanding outlines the process for handling complaints received by OCR or OSERS that may overlap with the other's responsibilities.[57] OSERS should refer to OCR all complaints it receives that allege facts which, if true, would constitute a violation of section 504 and/or section 504 and the IDEA. OCR should investigate referred complaints under its usual complaint procedures and report to OSERS on the results. OCR should investigate any complaint directly filed with OCR that alleges facts which, if true, would constitute a violation of section 504 alone, or both the IDEA and section 504. If, at the beginning of its investigation, OCR determines that the complaint, or part of the complaint, alleges a violation of the IDEA only, it should refer the complaint or the relevant portion to OSERS.[58]

The memorandum of understanding specifies that OCR and OSERS should exchange information and materials in the area of handicapped children and youth, for dissemination to OCR regional offices, Regional Resource Centers[59] and other OSERS technical assistance centers, as appropriate. OCR should provide information on its regional offices' addresses and technical assistance contact persons, its technical assistance training courses, products and materials from its central inventory, and reports containing technical assistance information. OSERS should provide information on scheduled events and meetings relating to the education of handicapped children, OSERS staff technical assistance plans, services and activities of Regional Resource Centers, and products and materials related to technical assistance to handicapped students.[60] The memorandum of understanding also recognizes that OCR and OSERS can engage in joint technical assistance activities, such as the development of materials and training packages and the participation in conferences.[61] The exchange of information and opportunity to conduct joint technical assistance activities is extremely useful.

However, beyond the coordination of functions outlined in this memorandum of understanding, OSERS' role in civil rights enforcement is limited. Based on DOEd's organization and division of functions, OCR is the sole office within DOEd with civil rights enforcement responsibilities. Consequently, OSERS's role in civil rights functions is limited to ensuring that grant applicants have submitted a signed form assuring that they do not discriminate.[62] It also consists of reviewing and providing comment on OCR's draft regulations and policies as they may relate to OSERS programmatic functions. For example, OSERS ordinarily would review OCR's policy guidance on the provision of a "free appropriate public education" to students with disabilities.[63]

Structure of OSERS

OSERS is headed by an Assistant Secretary,[64] who provides coordination, direction, and leadership for several policy/management offices, as well the National Institute on Disability and Rehabilitation Research, the Rehabilitation Services Administration, and the Office of Special Education Programs (OSEP). OSEP is the entity within OSERS with the sole responsibility for the IDEA

Education, to Michele Williams, Advocates for Children's Education, Miami, Florida, Mar. 14, 1994.

The memorandum of understanding specifies, "Whenever possible, the offices will issue jointly developed policy, after appropriate consultation with OGC." OSERS–OCR, Memorandum of Understanding, p. 2.

[57]For OCR, "complaints" means written statements alleging facts which, if true, would constitute a violation of Section 504. It does not include inquiries that only solicit OCR's interpretation of the law or OCR's policies. For OSERS, "complaints" means statements asking for the Department's investigation or intervention in a matter relating to a particular handicapped child or group of handicapped children, when those statements raise possible violations of part B of the IDEA. It does not include inquiries that only solicit OSERS's interpretation of the law or OSERS's policies. OSERS–OCR, Memorandum of Understanding, p. 3.

[58]Ibid., pp. 3–4.

[59]Regional resource centers are facilities established under one of the IDEA Federal grants programs. These centers provide many services, in the nature of consultation, technical assistance, and training, to State educational agencies, local school systems, and other public agencies providing early intervention services. *See* 20 U.S.C. § 1421(a) (Supp. V 1993).

[60]OSERS–OCR, Memorandum of Understanding, p. 5.

[61]Ibid.

[62]For example, when each applicant for financial assistance under a DOEd program completes its application package, it must sign an assurance that it will comply with civil rights laws. If the program office, in reviewing an application, receives information that an applicant or grantee may not be in compliance with civil rights requirements, the program office provides OCR with this information so that OCR can conduct followup activities. If an applicant or grantee requests from the program office information or technical assistance on civil rights issues, the program office will refer that applicant/grantee to OCR. Susan Craig, Assistant General Counsel, Division of Educational Equity and Research, Office of the General Counsel, U.S. Department of Education, to Frederick D. Isler, Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, response to U.S. Commission on Civil Rights' Request for Information, Feb. 1, 1996, General Attachment No. 1 (hereafter cited as OCR, Information Request Response).

[63]Ibid.

[64]The following officials, in the order shown, can serve in the Assistant Secretary's capacity if necessary: Deputy Secretary, Commissioner of Rehabilitation Services Administration, Director of National Institute on Disability and Rehabilitation Research, and Director of Office of Special Education Program. *See 1992 Mission Manual OSERS*, p. 2.

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and for the administration of the OSERS programs discussed below.[65]

The Office of Special Education Programs is led by a director, who reports to the Assistant Secretary of Special Education and Rehabilitative Services.[66] In addition to administrative offices, the Office of Special Education Programs is composed of the following divisions:

- *Educational Services.* Provides support for educating disabled children; monitors research, demonstration projects, and dissemination of findings in order to improve the education of disabled children and youth; and administers programs to bring captioning technology advances to the benefit of persons with disabilities.[67] The branches include Captioning and Adaptation, Early Childhood, Secondary Education and Transitional Services, and Severe Disabilities.[68]
- *Innovation and Development.* Provides information on the diverse learning processes and the impact of language and sensory motor difficulties on students and their teachers; and determines the impact and effectiveness of current and new education practices and procedures based on research findings.[69]
- *Program Analysis and Planning.* Provides cross-divisional comprehensive program analysis, which includes data collection and assessment, planning for initiatives, and reviewing fiscal and program plans in the Office of Special Education Programs' divisions.[70]
- *Assistance to States.* Administers parts A and B of the Individuals with Disabilities Education Act (IDEA) and other statutes. The division provides fiscal and technical assistance to State education agencies (SEAs) and monitors their delivery of efficient and effective education services to children with disabilities.[71]
- *Research to Practice Division.* This division, which consists of four teams (Early Childhood Team; Elementary and Middle School Team; Secondary Transition and Post-Secondary Team; and National Initiatives Team), oversees the discretionary grants, cooperative agreements, and contracts for projects administered by OSEP. Its mission is to "provide leadership and oversee the implementation of knowledge development, transfer, and use to improve educational results for infants, toddlers, children and youth with disabilities.[72]
- *Monitoring and State Improvement Planning Division.* This division administers the IDEA Part B, Part H, and 619 formula grant programs. It is organized into three teams, each of which has similar functions for its assigned States and entities. The teams approve State plans, monitor State Education, provide technical assistance, and work with "customers to assists them in accessing a free appropriate public education."[73]

OSEP also has a number of cross-cutting ad hoc work groups and cross-cutting work group on Improvement Planning and Systems Change that report to the Office of the Director.[74]

OSERS Programs

Early Education for Children with Disabilities

This program is authorized under the Individuals with Disabilities Education Act, and is administered in the Office of Special Education Programs, Educational Services Division, Early Childhood Branch. The objective of the program is to improve special education and early intervention services for infants, toddlers, and children under age 8 who have disabilities by addressing their intellectual, emotional, physical, mental, social, speech, or other communication mode, language development, and self-help skills..[75]

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[65] *See* OSERS organizational chart.

[66] OSEP, "Functional Statement and Organization Charts," attached to Judith E. Heumann, memorandum to Joseph Colantuoni, Director, Management Systems Improvement Group, Office of Special Education and Rehabilitative Services, U.S. Department of Education, "Request for approval of the Reorganization of the Office of Special Education Programs,: May 9, 1996.

[67] *1992 Mission Manual OSERS/OSEP*, p. 11.

[68] Ibid., p. 12.

[69] Ibid., p. 4.

[70] Ibid., p. 6.

[71] *1992 Mission Manual OSERS/OSEP*, p. 2. The Assistance to States office also serves as liaison between Office for Civil Rights and special education programs. Specifically, the Assistance to States Division's Program Administration Branch administers the IDEA grants process, and provides technical assistance and policy guidance to States for program monitoring and reviewing tasks. *See 1992 Mission Manual OSERS/OSEP*, pp. 2-3. The Program Review Branch monitors State formula grant programs, and develops and maintains a data base on implementation and administration of IDEA, part B. Based on the files maintained for each State, the branch can respond to information requests on children and parent concerns. In cases of noncompliance, the branch notifies the State education agencies, negotiates compliance agreements and directs cases to proper enforcement channels. *See 1992 Mission Manual OSERS/OSEP*, p. 4. This function will be discussed further in volume 2 of series of the Equal Educational Opportunity reports: *Equal Educational Opportunity for Students with Disabilities.*

[72] Ibid.

[73] Ibid.

[74] Ibid.

[75] *See* U.S.C. § 1423(a)(1)(A) (Supp. V 1993). *See also* Departments of Labor, Health and Human Services, and Related Agencies, *Hearings on Appropriations before the Subcommittee on the Departments of Labor, Health and Human Services, Education,*

Between 1992 and 1995, the program fulfilled its responsibilities and administrative activities with a relatively stable annual appropriation of $25 million.[76] Under the program, OSERS provides project grants to (a) support the development and testing of intervention strategies and demonstration activities related to the preschool and early childhood education for disabled individuals; and to (b) implement effective preschool and early childhood education for children with disabilities.[77]

Two recently funded endeavors include a longitudinal study of the effects and costs of early intervention services for infants and children who have disabilities; and the development and field-testing of intervention strategies to improve integration of children with disabilities into regular preschool, childcare, and kindergarten programs.[78]

Program for Children with Serious Emotional Disturbance

Also authorized under the Individuals with Disabilities Education Act and administered in the Educational Services Division's Early Childhood Branch, the program assists in developing innovative approaches to educating students with serious emotional disturbance (SED), enhancing professional knowledge and skills in working with this population, training service providers, promoting personal and social development of students with behavioral and emotional problems, and disseminating information.[79]

Children with SED typically have experienced a long-term inability to learn that cannot be explained by intellectual, sensory, or health factors.[80] SED also may be characterized by a hindrance in the students' competence for building appropriate relationships with peers and teachers.[81]

Of all groups of educationally disabled, students with SED show the lowest grade performance and are more likely to fail minimum competency examinations and course work, and be retained in grade.[82] Compared with 71 percent of all students and 56 percent of all students with disabilities, only 42 percent of SED students graduate from high school. Most tend to drop out formally from school by 10th grade.[83]

During the 1991-92 school year, approximately 400,000 children and youth with serious emotional disturbance, ages 6 to 21, were served by the Title I ESEA and Part B IDEA programs. There was an increase of more than 9,000 (2.6 percent) with serious emotional disturbance between 1990-91 and 1991-92 served by the Part B IDEA program. Since the 1976-77 school year, there has been an increase of more than 118,000 students (48 percent) identified as having SED served under both the Title I ESEA and Part B IDEA programs.[84] Since 1992, each year, approximately $4 million has been allocated to this program.[85]

Grants are used to fund research and demonstration activities for the purpose of improving special education and related services to children and youth with serious emotional disturbance.[86] Award eligibility for grants is restricted to institutions of higher education, State and local education agencies, and other appropriate public and private nonprofit institutions or agencies. Awards are made directly to successful applicants with no additional redistribution to other parties unless proposed by the applicant.[87] Although funding is generally for a 1 year period, multiyear projects (up to 5 years) are possible based on an annual evaluation.

Under the program OSERS provides project grants to:

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and Related Agencies of the House Appropriations Committee, 104th Cong., 1st sess. 67 (1995), p. 908; and DOEd, *1993–1994 Biennial Report*, p. 306-1.

[76]DOEd, *1993–1994 Biennial Report*, pp. 306-1–306-2.

[77]DOEd, *1993–1994 Biennial Report*, pp. 306-1–306-2. In addition, the program grants can be used to disseminate information to the community and general public, as well as managers and teachers, to assist them in service delivery. Also, Early Education for Children with Disabilities emphasizes conducting demonstration projects that address strategies to track at-risk children who face many obstacles and are exceptionally low achievers. *See DOEd, 1993–1994 Biennial Report*, pp. 306-1–306-2. Parent participation and evaluation of effectiveness of each project are required. *See* Executive Office of the President, Office of Management and Budget, *Update to the 1995 Catalog of Federal Domestic Assistance* (1995), p. 823 (hereafter cited as *Catalog of Assistance*). Grant applicant eligibility is restricted to public agencies or private nonprofit organizations. Awards for 1 to 3 years are based on evaluations and recommendations by outside experts, and are submitted to the Secretary of Education. For demonstration, outreach, and experimental projects, 10 percent of the total cost of the project must be provided by the grant recipient. *See Catalog of Assistance*, p. 823.

[78]DOEd, *1993–1994 Biennial Report*, pp. 306-1–306-2.

[79]DOEd, *1993–1994 Biennial Report*, p. 315-1.

[80]34 C.F.R. § 300.7(9) (1995).

[81]Ibid.

[82]DOEd, *1993–1994 Biennial Report*, pp. 315-1–315-2.

[83]DOEd, *1993–1994 Biennial Report*, pp. 315-1–315-2.

[84]DOEd, *1993–1994 Biennial Report*, pp. 315-1–315-2.

[85]DOEd, *1993–1994 Biennial Report*, p. 315-1.

[86]Funds for demonstration projects may be used to facilitate interagency and private sector resource pooling to improve services for children and youth with serious emotional disturbance. *See Catalog of Assistance*, p. 934. The program provides some support for personnel development activities. *See* DOEd, *1993–1994 Biennial Report*, p. 315-1. Information and training for those involved with, or who could be involved with, children and youth with SED may also be supported. *See Catalog of Assistance*, p. 934.

[87]*Catalog of Assistance*, p. 934.

(a) Examine the effects of school preparedness programs to promote personal and social development of behavioral and emotionally troubled students; and
(b) Develop, validate, and confirm a national agenda to improve services for children and youth with, or at risk of developing, serious emotional disturbance.[88]

Grants to States: "The Part B IDEA Program"

The Office of Special Education Programs, Division of Assistance to States, Program Administration Branch, is responsible for implementing the grant program authorized under Part B of the Individuals with Disabilities Education Act (IDEA). Beneficiaries of the IDEA are entitled to civil rights protection under section 504 of the Rehabilitation Act,[89] as beneficiaries of a federally assisted program. Therefore, recipients of services under IDEA are entitled to protection against discrimination based on their disability.[90]

For the past 5 years, an annual appropriation of approximately $2 billion has enabled this program to serve between 4 and 5 million children with disabilities.[91] Each participating State's share of the entire appropriation is determined by a formula and is based on the number of disabled children between the ages 3–21 or 6-21 served.[92]

More than half the students under age 21 served by IDEA, part B, are identified as having a "specific learning disability." In 1992–1993, of the 4½ million students treated in this program, more than 2 million participants had a specific learning disability, 1 million had speech or language impairments,[93] and nearly one-half million were mentally retarded. The remaining program recipients had disabilities ranging from autism to traumatic brain injury to visual impairments.[94]

To ensure that the beneficiaries of IDEA receive services in accordance with the provisions of the act, OSERS conducts a comprehensive review, examination, and approval process for each State plan; implements the program's off-site monitoring duties for each State; and prepares monitoring reports and initiates followup activities. In addition, OSERS conducts comprehensive compliance reviews. In cases of noncompliance, OSERS formally notifies the State education agency, negotiates acceptable compliance agreements, verifies for corrective action, and if necessary, directs cases to enforcement procedures.[95]

Office of Bilingual Education and Minority Languages Affairs

The Role of Equal Educational Opportunity in Bilingual Education

In 1968, in its first reauthorization, the Elementary and Secondary Education Act was amended, in part, by

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[88]DOEd, *1993–1994 Biennial Report*, p. 315-3. Supported activities aimed at enhancing professional knowledge, skills, and strategies for addressing the learning and lifestyle concerns of students with SED include:
(a) A comparison of two approaches to increasing skills and application of interventions for effective inclusion of students with SED within regular education classrooms—a project that aims to address equal participation in all classes and activities directly; and
(b) Training and support for education, social work, and mental health professionals to address the special needs of students with SED, in the context of service delivery.

[89]Pub. L. No. 93–112, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794(a) (1994)). For section 504, DOEd's Office for Civil Rights' Policy Enforcement and Program Service is responsible for compliance and enforcement matters. *See 1992 Mission Manual OCR/PEPS*, p. 2.

[90]Section 504 of the Rehabilitation Act of 1973 confers that "no otherwise qualified individual with a disability . . . shall . . . be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance, or under any program or activity conducted by any Executive agency or by the U.S. Postal Service . . . ." *See* 29 U.S.C. § 794(a)(1988 & Supp.V). The IDEA created substantive and procedural rights for children with disabilities and their parents. *See* Aleman, *IDEA*, p. 1; and 20 U.S.C. § 1401-1412 (1988 & Supp.V). Specifically, children with disabilities are entitled to a free appropriate public education, including special education and related services regardless of the type or severity of the disability. *See* Aleman, *IDEA*, p. 1; and 20 U.S.C. § 1401-1412 (1988 & Supp.V). The public education must also be appropriate to the individual's unique needs, abilities, and development, according to the individualized education program (IEP). In addition, the specialized education and related services must be provided in the least restrictive environment possible. *See* Aleman, *IDEA*, p. 1; and 20 U.S.C. § 1401-1412 (1988 & Supp.V). Moreover, the parents of each child with a disability are guaranteed due process rights in the evaluation and placement of the child. *See* 20 U.S.C. § 1401-1412 (1988 & Supp.V).

[91]DOEd, *1993–1994 Biennial Report*, pp. 302-1–302-3.

[92] *See* 20 U.S.C. §§ 1411(a), 1419 (Supp. V 1993); 34 C.F.R. Section 300.701 (1995).

[93]A speech or language impairment is considered a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment that adversely affects a child's educational performance. *See* 34 C.F.R. § 300.7(1) (9/29/92).

[94]DOEd, *1993–1994 Biennial Report*, p. 302-4.

[95]OSERS also contacts parent and advocacy organizations, State and regional personnel, and various education organizations regarding pre-site monitoring communications; reviews annual performance reports and data; responds to public and other requests for information regarding specific children, parent concerns, and requests related to a specific State; continues to track and process formal complaints received from individuals and organizations; and refers child complaints to OCR, reviews OCR reports, and responds to Inspector General audit reports. *See 1992 Mission Manual OSERS/OSEP*, pp. 2–4.

the Bilingual Education Act.[96] Under this act, a small amount of funds was to be made available to school districts for innovative elementary and secondary school bilingual education programs,[97] as well as courses to impart students with a knowledge of history and culture associated with their language.[98] This legislation was motivated by several concerns expressed by Congress. For example, there was concern that many language-minority Americans were limited in their English proficiency,[99] education, and income.[100] There was recognition that a large and growing number of children and youth who are nonnative speakers of English with limited-English-proficiency skills, face a number of challenges (e.g., segregated education programs, disproportionate and improper placement in special education programs, limited-English-proficiency of their own parents, and others) in receiving education that could ultimately hinder their ability to fully participate in American society.[101] In addition, there was consensus across education experts, State and local officials, community groups, and parents endorsing the Federal legislative branch's concern that linguistic minorities had suffered a long history of educational failure.[102]

The class action Title VI case, *Lau v. Nichols*,[103] which involved Chinese-speaking students in the San Francisco school district, was decided in 1974.[104] *Lau* constitutes the Supreme Court's only substantive statement on language assistance issues in education since its 1923 decision in *Meyers v. Nebraska*.[105] The case articulated that a public school district that accepted Federal funds must comply with the Department of Health, Education, and Welfare's (HEW's) regulatory guidelines and agree to provide special programs to meet the needs of limited-English-proficiency students (LEPs). That is, the HEW regulation stipulated that a school district accepting Federal funds for its programs must "take affirmative steps" to rectify students' English language deficiencies and enable speakers of other languages to acquire effective communication skills, so that its instructional programs are open to all students.[106] The school district's failure to enable these students to acquire effective English language skills was found to be in violation of Title VI of the Civil Rights Act.[107]

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[96]Pub. L. No. 90–247, 81 Stat. 783 (codified as amended in scattered sections of 20 U.S.C.).

[97]Bilingual education is a broad concept encompassing a variety of methods for teaching English, ranging from stressing English-only to balancing the learning of English with the continual study of native languages and cultures. *See* Michael Rebell and Anne Murdaugh, "National Values and Community Values: Part II: Equal Educational Opportunity for Limited English Proficient Students," *Journal of Law and Education*, vol. 21, no. 3 (Summer 1992), pp. 335–80 (hereafter cited as Rebell and Murdaugh, "National Values and Community Values"). The Bilingual Education Act defines bilingual education as the provision of instruction in English to the "extent necessary to allow a child to progress effectively through the educational system using his or her native language." *See* Betsy Levin, "An Analysis of the Federal Attempt to Regulate Bilingual Education: Protecting Civil Rights or Controlling Curriculum?" *Journal of Law and Education*, vol. 12, no. 1 (January 1983), p. 33.

[98]Betsy Levin, "An Analysis of the Federal Attempt to Regulate Bilingual Education: Protecting Civil Rights or Controlling Curriculum?" *Journal of Law and Education*, vol. 12, no. 1 (January 1983), p. 33 (hereafter cited as Levin, "Regulate Bilingual Education").

[99]20 U.S.C. § 7601(8) (1994). The statute defines a person with limited English proficiency as an individual

(A) who—

(i) was not born in the United States or whose native language is a language other than English and comes from an environment where a language other than English is dominant; or

(ii) is a Native American or Alaska Native or who is a native resident of the outlying areas and comes from an environment where a language other than English has had a significant impact on such individual's level of English language proficiency; or

(iii) is migratory and whose native language is other than English and comes from an environment where a language other than English is dominant; and

(B) who has sufficient difficulty speaking, reading, writing, or understanding the English language and whose difficulties may deny such individual the opportunity to learn successfully in classrooms where the language of instruction is English or to participate fully in our society.

[100]20 U.S.C. § 7402(a)(4) (1994).

[101]20 U.S.C. § 7402(a)(5) (1994).

[102]Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1251, 1251-53 (1988)

[103]414 U.S. 563 (1974).

[104]For a further discussion of the *Lau* decision and its impact, *see* U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s* (February 1992), pp. 81–88.

[105]The case recognized that a language impediment, such as "inability to speak and understand the English language" can prevent/exclude a national origin-minority group of students from effective participation in the regular education program offered by a school district. Effective participation would require the educational experience to be meaningful and coursework comprehensible. Rebell and Murdaugh, "National and Community Values," p. 357.

[106]J. Stanley Pottinger, Director, Office for Civil Rights, U.S. Department of Health, Education, and Welfare, memorandum to school districts with more than five percent National Origin-Minority Group Children, "Identification of Discrimination and Denial of Services on the Basis of National Origin," May 25, 1970, p.2. *See Also*, Rebell and Murdaugh, "Naitonal and Community Values," p. 357.

[107]414 U.S. at 568. *Lau* has been interpreted to conclude that Federal administrative and judicial enforcement could be invoked by claims of ineffective or nonexistent bilingual programs without any need to prove a school board intended to discriminate against lin-

Following the *Lau* decision in 1974, the reauthorized Bilingual Education Act imposed an affirmative duty on school officials to provide special assistance to LEP children and imposed the sanctions for noncompliance to sever, reduce, or delay Federal funds received by the school district.[108] Congress states that the purpose of the amendment was to encourage the establishment and operation of education programs using bilingual education practices, techniques, and methods, as well as provide fiscal incentives to willing school districts that were already committed to assisting LEP children.[109]

guistic minorities. This interpretation is based on the fact that the Court based its decision on HEW's "discriminatory effect regulations and guidelines," for Title VI. *See* Rebell and Murdaugh, "National Values and Community Values," p. 357.

The civil rights background of bilingual education had important implications. First, it meant that in the modern era, bilingual education would become a legal/advocacy cause, as well as educational issue. Second, bilingual education, which in the past had been a matter of local community concern, had now become a matter of national policy. Consequently, bilingual education in the 20th century became more expansive and more controversial than previously, as Congress, the executive agencies, and the courts became actively involved in shaping education policy in this area. *See* Rebell and Murdaugh, "National Values and Community Values," p. 340.

Courts claim to allow broad discretion for local application of basic equity values, in apparent recognition of the diversity of legitimate perspectives in our society on these issues. More specifically, although *Lau* did legitimize a civil rights approach to the issue of bilingual education, and ruled on statutory and regulatory grounds which were supportive of providing special assistance to LEPs (to ensure equal education opportunity), no particular pedagogical approach/no specific remedy toward bilingual education was endorsed. That is, how equal opportunity should be implemented was not specified in the Bilingual Education Act or any of its amendments. *See* Rebell and Murdaugh, "National Values and Community Values," p. 345.

Since the 1970s, there continues to be an evident shift from the interpretation of the concept of nondiscrimination in which all children receive the exact same education (e.g. classes, teachers, instruction, resources), regardless of ability to comprehend English, to the notion of implementation of policies which advocate the urgency to treat children with certain traits or characteristics differently. LEP students must be provided with special help not provided to other children, so that they are not deprived of an opportunity equal to that of others more fluent in English—students who can take full advantage of the education the governmental entity offers. In the long-run, deliberate intervention strategies offered to LEP students can enable them to be brought to a level where they can compete equally. *See* Levin, "Regulate Bilingual Education," p. 32.

[108]*See* Levin, "Regulate Bilingual Education, p. 33.

[109]Ibid.

Overview

The Office of Bilingual Education and Minority Languages Affairs (OBEMLA) was created a decade after the Civil Rights Act of 1964 following several major congressional and judicial decisions. In 1974, the reauthorized Bilingual Education Act created an Office of Bilingual Education, within HEW's Office of Education.[110] The Office of Bilingual Education had authority to promote, monitor, and evaluate bilingual education programs.

Currently, DOEd's Office of Bilingual Education and Minority Language Affairs[111] continues to recognize the growing number of linguistically and culturally diverse children enrolled in schools who, in spite of their language proficiency limitations, should be receiving an education equal to that of their peers.[112] Throughout this last decade of the 20th century, public school enrollments will continue to be transformed by an increase in the number of students who bring linguistic and cultural diversity with them to America's public schools.[113] Some of the key bilingual education programs administered by OBEMLA are:

Bilingual Education Capacity and Demonstration Grants
- Program Development and Implementation Grants[114]
- Program Enhancement Grants[115]
- Comprehensive School Grants[116]
- Systemwide Improvement Grants[117]

Research, Evaluation, and Dissemination
- Research and Evaluation Activities, including Field Related Research[118]
- Academic Excellence Awards[119]
- State Grant Program[120]
- National Clearinghouse for Bilingual Education[121]

Professional Development

[110]Pub. L. No. 93–380, § 105, 88 Stat. 503, 512; Rebell and Murdaugh, "National and Community Values, " p. 357.

[111]The name of the office was changed to the Office of Bilingual Education and Minority Languages Affairs in 1984 by Pub. L. No. 98–511, title II, 98 Stat. 2369, 2373.

[112]U.S. Department of Education, Office of Bilingual Education and Minority Language Affairs, *Educating Linguistically and Culturally Diverse Students*, no date, p. 1 (hereafter cited as DOEd, "Diversity").

[113]Ibid.

[114] 20 U.S.C.A. § 7422 (West Supp. 1996).

[115] 20 U.S.C.A. § 7423 (West Supp. 1996).

[116] 20 U.S.C.A. § 7424 (West Supp. 1996).

[117] 20 U.S.C.A. § 7425 (West Supp. 1996).

[118] 20 U.S.C.A. § 7452 (West Supp. 1996).

[119] 20 U.S.C.A. § 7453 (West Supp. 1996).

[120] 20 U.S.C.A. § 7454 (West Supp. 1996).

[121] 20 U.S.C.A. § 7455 (West Supp. 1996).

- Bilingual Education Teachers and Personnel Grants[123]
- Bilingual Education Career Ladder Program Grants[124]
- Graduate Fellowships in Bilingual Education[125]

Between the 1991–92 and 1993–94 school years, schools experienced a 13 percent increase in their enrollment of students with limited English proficiency.[126] Approximately 66 percent of LEP students are in grades K through 6.[127] Although LEP students speak more than 150 languages,[128] almost three-fourths of these students speak Spanish as their native language: Vietnamese, spoken by 4 percent of LEP students, is the next largest language group.[129]

OBEMLA's Mission and Responsibilities

OBEMLA was created in 1974 to assist school districts[130] in complying with their responsibilities to promote equal educational opportunity and meet the needs of linguistically and culturally diverse students.[131] To pursue this mission, OBEMLA aims to increase and promote improvements in State and local education services, as well as curricular materials for linguistic minority students; and to strengthen the capabilities of higher education institutions and related agencies that provide bilingual education training courses. It also strives to provide financial assistance to students who are preparing to become bilingual education teachers.[132] To fulfill this mission, OBEMLA administers grants and provides technical assistance to local education agencies' (LEA) special programs that enable LEP students to benefit fully from their educational opportunities.[133] OBEMLA's role in preserving equal educational opportunity has evolved from congressional policy and judicial decisions.

OBEMLA's role in civil rights enforcement is limited. Formally, it has no responsibilities for civil rights enforcement. Based on DOEd's organization and division of functions, OCR is the sole office within DOEd with civil rights enforcement responsibilities. Consequently, OBEMLA's role in civil rights functions is limited to ensuring that grant applicants have submitted a signed form assuring that they do not discriminate.[134] It also consists of reviewing and providing comment on OCR's draft regulations and policies as they may relate to OBEMLA programmatic functions.[135] OBEMLA does not conduct independent investigations of civil rights issues, nor does it provide technical assistance to grantees on civil rights compliance.[136] Rather, OBEMLA refers information on noncompliance and requests for technical assistance to OCR.[137]

Although OBEMLA has no formal civil rights responsibilities, it has made efforts in the past to promote equal educational opportunity in creating program requirements. Specifically, OBEMLA's former regulations for bilingual education programs contained requirements incorporating criteria essential to equal educational opportunity, such as parental notification, promotion of parental involvement, and teacher training.[138] However, these regulations were withdrawn as of July 1995, and there are no plans to publish new regulations.[139]

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[122] 20 U.S.C.A. § 7472 (West Supp. 1996).
[123] 20 U.S.C.A. § 7473 (West Supp. 1996).
[124] 20 U.S.C.A. § 7474 (West Supp. 1996).
[125] 20 U.S.C.A. § 7475 (West Supp. 1996).
[126] By 1992–1993, elementary and secondary schools enrolled more than 2 million of these students—an increase of more than 85 percent since 1984. DOEd, "Diversity," p. 2; Office of Bilingual Education and Minority Language Affairs, U.S. Department of Education, "How Title I and Title VII Can Work Together to Improve the Performance of Limited English Proficient Students," March 1995, p. 1 (hereafter cited as DOEd, "Title I and Title VII").
[127] DOEd, "Title I and Title VII," p. 1.
[128] DOEd, "Diversity," p. 2.
[129] DOEd, *1993–1994 Biennial Report*, p. 201-2.
[130] Altogether, OBEMLA programs (based on 1993 data) reached K–12 students in 42 percent of the Nation's 15,000 school districts. See DOEd, *1993–1994 Biennial Report*, p. 201-2.
[131] *1992 Mission Manual OBEMLA/SLPD*, p. 1.
[132] Ibid., *OBEMLA/IO*, p. 1.
[133] To support its technical assistance function, OBEMLA provides grants to support a National Clearinghouse on Bilingual Education. In addition to its service delivery role, OBEMLA funds are used for research endeavors that aim to determine effective instructional approaches for enabling LEP students to utilize their native language, while achieving competence in English; and that aim to develop alternative instructional programs and material resources. *See 1992 Mission Manual OBEMLA/IO*, p. 1.
[134] For example, when each applicant for financial assistance under a DOEd program completes its application package, it must sign an assurance that it will comply with civil rights laws. If the program office, in reviewing an application, receives information that an applicant or grantee may not be in compliance with civil rights requirements, the program office provides OCR with this information so that OCR can conduct followup activities. If an applicant or grantee requests from the program office information or technical assistance on civil rights issues, the program office will refer that applicant/grantee to OCR. OCR, Information Request Response, General Attachment No. 1.
[135] OCR, Information Request Response, General Attachment No. 1.
[136] Ibid.
[137] Ibid.
[138] *See* 34 C.F.R. §§ 500.15, 500.21, 525.31, 501.42 (1994).
[139] *See* OCR, Information Request Response, "Office of Bilingual Education and Minority Languages Affairs," no. 4.

Structure of OBEMLA

OBEMLA is headed by an office Director, who reports directly to DOEd's Secretary of Education.[140] OBEMLA's Director provides coordination, direction, and leadership for two divisions, the Division of State and Local Programs and the Division of National Programs. In addition to the two main divisions, OBEMLA's Research and Evaluation staff collects, aggregates, analyzes, and publishes data on the division's programs.[141]

The Division of State and Local Programs operates as one distinct entity (i.e., there are no branches, councils, institutes, etc. within the division). The primary focus of the division is to assist State and local school systems in improving their capacity to provide special programs for children of limited English proficiency.[142] The division is charged with administering programs authorized by Title VII of the Elementary and Secondary Education Act.[143]

The State and Local Programs Division is led by a director who reports to the Director of the Office of Bilingual Education and Minority Language Affairs. The State and Local Programs Division director provides overall coordination and leadership to the staff that administer the two programs (Titles VIIA and VIIB). Distinct division teams are assigned to the division's specific grant programs.[144] The various responsibilities for grants processing and management are in relation to initiating the grants process, which requires soliciting, reviewing, and selecting proposals and applications; selecting and convening review panels; scoring applications for approval; and preparing funding documents.[145] Other duties are in relation to monitoring and reviewing Title VIIA grantees' programs; and analysis and dissemination of research from Title VIIB grantees.[146]

Grant Structure to Fund OBEMLA'S Bilingual Education (Instructional) Program

OBEMLA's Bilingual Education program is authorized under the Bilingual Education Act (Title VII, part A, of the reauthorized Elementary and Secondary Education Act),[147] and is administered in the Division of State and Local Programs. The purpose of the program is to (a) develop and implement new comprehensive and coherent bilingual education programs, and (b) execute highly focused, innovative, locally designed projects to expand or enhance existing bilingual education or special alternative instruction programs for LEP students.[148] The program provides financial incentives to school districts to develop effective approaches to provide instruction to LEP students to achieve competence in English.[149]

The program allocates competitive awards and provides technical assistance to local school districts. The grants range from 2 to 5 years in duration and are to be used by the district's schools to provide LEP classroom instruction. The instructional programs are designed to assist LEPs in meeting challenging State performance standards, and to improve the overall quality of instructional programs for LEP students.[150]

In 1993, about 350,000 children were served by projects funded under Title VII, part A, and many were disproportionately represented in schools with high concentrations of poor children.[151] More than 40 percent of all LEP students attend schools in which at least 75 percent of students are part of the high poverty population.[152] For instance, the proportion of LEP first grade students in high poverty schools (21.6 percent) is three times the proportion in low poverty schools (7.2 percent).[153] The student recipients of the program's services include those with limited proficiency in comprehending, speaking,

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[140]20 U.S.C. § 3420 (1994). The Director of OBEMLA is a key advisor to the Secretary on departmental matters related to educating LEP students from kindergarten through high school. The Director finalizes policy related to bilingual education and other programs that serve LEP students. *See 1992 Mission Manual OBEMLA/IO*, p. 1.

[141]*1992 Mission Manual OBEMLA/IO*, p. 2.

[142]*1992 Mission Manual OBEMLA/SLPD*, p. 1.

[143]Pub. L. No. 89–10, 79 Stat. 27, as amended, Pub. L. No. 100–297, 102 Stat. 130; and Pub. L. No. 103–382, § 101, 101 Stat. 3716 (codified at 20 U.S.C. §§ 7401–7516 (1994)). By statute, part A programs must receive at least 60 percent of the entire Bilingual Education Act's funds. DOEd, *1993–1994 Biennial Report*, p. 201-1.

[144]*1992 Mission Manual OBEMLA/SLPD*, p. 2.

[145]Ibid.

[146]Ibid., pp. 2–3. Project and overall program monitoring and reviewing functions include preparing for and conducting site visits; examining grantees' progress, interim, and final reports; providing technical assistance to grantees; co-monitoring evaluation contracts; and responding to congressional, Executive branch, and appropriate nongovernmental individuals and organizations. Analysis and dissemination of data include synthesizing reports by priority areas, determining data acquisition needs, and identifying and disseminating successful bilingual education practices.

[147]20 U.S.C. §§ 7401–7491 (1994).

[148]*Catalog of Assistance*, p. 969.

[149]Ibid., p. 969.

[150]*Hearings on Appropriations* (1995), pp. 850–51.

[151]DOEd, *1993–1994 Biennial Report*, p. 201-2.

[152]DOEd, "Title I and Title VII," p. 1.

[153]DOED, *1993–1994 Biennial Report*, p. 201-2.

"cut-off" English proficiency test scores for program selection.[155]

In addition, LEP students are disproportionately represented among low achievers. Among students who score below the bottom one-third on nationally normed achievement tests, about 13 percent of elementary students are classified as LEP, yet under 3 percent, and the percent decreases as the children "progress" through school, of the highest quartile standardized test scorers are LEP students.[156] Moreover, LEP students tend to have high poverty and dropout rates, as well as other deprivations that can hinder ability to prepare for future economic and personal success.[157]

Various strategies have been recommended on how to remedy the academic needs as well as lack of English proficiency skills among language minority groups, and ultimately enable them to achieve full participation in all aspects of political, social, and economic life. While the Elementary and Secondary Education Act of 1988 mandated grant competitions based on instructional method and the group to be served, the 1994 reauthorization of Title VII (the most recent) permits schools to select the instructional approaches that are best suited to their LEP students.[158]

The various approaches and subjective beliefs about appropriate strategies to teaching English to LEP students can be accommodated by the flexible grants awarded to school districts. The program dispenses six types of discretionary grants to local school districts which intend to establish, operate, or improve assistance to LEP students at the elementary or secondary school level.[159] The distinct grants are awarded to develop and conduct six different types of programs. Transitional Bilingual Education is designed to provide structured English language instruction to linguistic minority students to permit them to achieve competence in English. In addition an LEP child can receive instruction in his or her native language.[160] Developmental Bilingual Education provides instruction in English and in the student's native language to develop proficiency in both languages, while developing basic subject matter skills in the student's native language.[161] Special Alternative Instruction provides structured English language class as well as additional special services to assist linguistic minority students in achieving English language competence.[162] Academic Excellence is a program that facilitates the dissemination of model, effective bilingual practices that can be either transitional, developmental, or special alternative.[163] Family English Literacy helps LEP adults and out-of-school youth achieve competence in English, with instruction in a native language or English. Preferred program beneficiaries are parents and immediate family members of students enrolled in other Bilingual Education Act programs.[164] Special Populations is a program administered to preschoolers and gifted and talented and special education students designed to be preparatory or supplementary to the aforementioned programs.[165]

Eligible applicants for all six grant project types are local education agencies and in some cases institutions of higher education; private nonprofit and for-profit organizations; and nonprofit institutions or organizations that operate elementary or secondary schools. Awards are based on evaluations and recommendations of outside experts, internal review of all applications, and recommendations from State education agencies. Each project's duration ranges from 1 to 3 years, and continuation of a multiyear award is conditioned on the availability of funds and grantee's demonstration of substantial progress toward achieving program objectives.[166] The average program grant is $160,000 and overall assistance ranges from $5,000 to $500,000 (based on 1993 data) across the six grant types.[167]

Overall, appropriations for OBEMLA have increased in the two decades since the office was established, in

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[155]DOEd, *1993–1994 Biennial Report*, p. 201-3.

[156]Ibid., p. 201-2.

[157]DOEd, "Title I and Title VII," p. 1.

[158]*Hearings on Appropriations* (1995), p. 851.

[159]*1992 Mission Manual OBEMLA/SLPD*, p. 1.

[160]Basic subjects tend to be taught in a student's native language, with appropriate complementing, intense instruction in English. *See* DOEd, *1993–1994 Biennial Report*, p. 201-3. As students become more proficient in the latter language, the native language is gradually "phased out," and students are eventually integrated into the regular, English-only classrooms. *See* Rebel and Murdaugh, "National and Community Values," p. 341.

[161]DOEd, *1993–1994 Biennial Report*, p. 201-3.

[162]Ibid. In 1993, Transitional Bilingual Education and Special Alternative Instruction had the greatest number of projects funded (588 and 317 respectively). Over $86 million was appropriated for the former, and $37 million for the latter. There are fewer than 50 projects funded in each of the remaining four grant categories, in total costing approximately $26 million (based on 1993 data). *See* DOEd, *1993–1994 Biennial Report*, p. 201-4. Unlike the traditional bilingual education programs, which depend on the students' native languages to provide content instruction, Special Alternative Instruction programs depend on English as the primary language of instruction. *See, generally*, General Accounting Office, *Limited English Proficiency: A Growing and Costly Educational Challenge Facing Many School Districts*, a Report to the Chairman, Committee on Labor and Human resources, U.S. Senate (January 1994), pp. 24–25.

[163]Ibid.

[164]DOEd, *1993–1994 Biennial Report*, p. 201-3.

[165]Ibid..

[166]Ibid., p. 201-4.

[167]Ibid.

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spite of some funding declines in the early 1980s. In 1975, $54 million was provided for the Bilingual Education Program, which more than doubled by 1980 to $116 million. Subsequently, the program experienced decreases from that 1980 peak, reaching its lowest level in 1983 at $87 million. Since then, consistent increases from 6 to 10 percent during the 1980s and variable increases from 2 to 21 percent in the 1990s in the appropriation level, were provided for the discretionary grant projects.[168] Since the program began in 1969, Congress has appropriated more than $3.3 billion to meet the goals of the Act.[169]

OBEMLA'S Revised Grant Structure to Fund the Bilingual Education (Instructional) Program

In 1994, OBEMLA became concerned with aligning its major program elements with DOEd's mission, the Secretary's priorities, and the primary directions of the Improving America's Schools Act of 1994[170] and the Goals 2000: Educate America Act of 1994.[171] The Improving America's Schools Act of 1994 stressed OBEMLA's objective to foster local education agencies' ability to provide high-quality instruction through bilingual education or special alternative instruction programs for LEP students (such as English as a Second Language); as well as to help language minority children and youth meet the same State content and performance standards expected for all students. The statute states:

The purpose of [the program] is to educate limited English proficient children and youth to meet the same rigorous standards for academic performance expected of all children and youth, including meeting challenging State content standards and challenging State student performance standards in academic areas by –

(1) developing systemic improvement and reform of educational programs serving limited English proficient students through the development and implementation of exemplary bilingual education programs and special alternative instruction programs;
(2) developing bilingual skills and multicultural understanding;
(3) developing the English of such children and youth ant, to the extent possible, the native language skills of such children and youth;
(4) providing similar assistance to Native Americans with certain modifications relative to the unique status of Native American languages under Federal law;
(5) developing data collection and dissemination, research, materials development, and technical assistance which is focused on school improvement for limited English proficient students; and
(6) developing programs which strengthen and improve the professional training of educational personnel who work with limited English proficient students.[172]

OBEMLA also was concerned with strengthening the role of States and State education agencies to bring them into full partnership with local education agencies in addressing the education of linguistically and culturally diverse students.[173]

Consequently, the office is in the process of replacing the current discretionary grant portfolio of the six disparate types of bilingual education grants with four functional discretionary grant categories. Program Development and Implementation Grants are 3-year grants used to assist local education agencies in designing and implementing new and comprehensive bilingual education programs for linguistically and culturally diverse students.[174] An estimated $25 million has been appropriated for Program Development and Implementation Grants for FY 1996.[175] Program Enhancement Project Grants are 2-year grants designed to assist local education agencies in implementing highly focused, innovative, and locally designed projects to expand or refine existing bilingual education for language minority students.[176] Approximately $36 million has been appropriated for these project grants for FY 1996.[177] Comprehensive School Grants are 5-year grants designed to assist local education agencies in improving, reforming, and upgrading all elements of an *individual school*'s program and operations to fulfill the educational needs of all LEP students.[178] Systemwide Improvement Grants also are awarded competitively, for 5 years to enable local education agencies to improve and upgrade all relevant programs and operations throughout the entire K–12 learning experience. The grants are designed to meet the educational needs of nonproficient

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[168]DOEd, *1993–1994 Biennial Report*, p. 201-1.
[169]*Hearings on Appropriations* (1995), p. 850.
[170]Pub. L. No. 103–382, 108 Stat. 3518 (codified in scattered sections of 20 U.S.C.).
[171]Pub. L. No. 103–227, 20 U.S.C. § 5801.
[172] 20 U.S.C.A. Sec. 7402(c) (West Supp. 1996).
[173]DOEd, "OBEMLA's Strategic Plan," October 1994, p. 1 (hereafter cited as DOEd. "OBEMLA Plan").
[174]DOEd, "Diversity," p. 4.
[175]Criteria for selecting proposals under this program include how well the project meets the purposes of the authorizing statute, the extent of need for the project, plan of operation, quality of key personnel, budget and cost effectiveness, evaluation plan, and adequacy of resources. *See Catalog of Assistance*, p. 969.
[176]DOEd, "Diversity," p. 5.
[177]*Catalog of Assistance*, p. 970.
[178]DOEd, "Diversity," p. 5.

English speakers on a *districtwide* basis.[179] The emphasis is not on administrative boundaries but on comprehensive education systems that create strong linkages between all of the education stages of children and youth.[180] Approximately $19 million has been appropriated for FY 1996.[181]

These new grant categories are designed to permit more systemic flexibility at the school level for developing, implementing, and expanding education programs that build upon the strengths of linguistically and culturally diverse students. The overall goal is to help LEPs achieve high academic standards.[182] In addition, under the revised grant structure, a network of 18 Title VII-funded technical assistance centers provides guidance to State and local education agencies in addressing concerns about LEP students. Areas in which assistance is provided include professional development, curriculum materials and development, parent involvement, and student assessment.[183]

Congress is very concerned that LEP students enter their respective schools with assurance that their language and culture will be respected, maintained, and enhanced whenever possible. Consequently, under each grant category, no more than one-fourth of funds can be used for projects that exclude the use of the LEP children's native language in instruction.[184] In addition, Comprehensive School and Systemwide Improvement grants can be terminated if biennial evaluations fail to show that students served are not making adequate progress towards State content and student performance standards, or if the grant is not, as designed and intended, promoting dual language competence.[185]

OBEMLA's Mission to Address the "Multidimensional" LEP Student

Since 1995, based on the Office of Bilingual Education and Minority Language Affairs' support of DOEd's mission and its aim for systemic reform of K–12 education, OBEMLA has been attempting to promote educational excellence and provide equal access to high-quality education to linguistically and culturally diverse students.[186] To achieve its objectives, OBEMLA is addressing the needs of LEP students from a "multidimensional standpoint" and is aiming to integrate its bilingual services with one another and with other education and human services that are provided to this potentially at-risk population.[187] OBEMLA plans to link together local schools and school districts, States and State education agencies, and the Federal Government into a partnership that concentrates its efforts on addressing the entire education system—curriculum, teaching, and student assessment, in a comprehensive rather than piecemeal fashion.[188]

OBEMLA is aiming to coordinate all components of Title VII along with other education and human services, to address the diverse needs of LEP students effectively. Specifically, given the comprehensive service requirements of most LEP students, the Office is enhancing its organizational and functional capacities to implement effective Title VII programs and coordinate its service provision with other related Federal and non-Federal programs.[189] For instance, along with bilingual education, several other distinct Federal programs serve LEP students. Forty-three percent of the Nation's linguistic minority students are in Title I programs, and they account for 17 percent of the programs' 6.4 million participants, based on 1992–1993 data.[190] Both Title I and Title VII are geared to helping children acquire the knowledge and skills required to meet the same challenging standards as their peers are expected to achieve. Moreover, both Titles encourage schoolwide staff development, increased parental involvement, and schoolwide programs.[191] Given the similarities, the two programs can integrate service provision for LEP students.[192]

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[179]Ibid.

[180]U.S. Department of Education, Office of Bilingual Education and Minority Languages Affairs, "Title VII: Bilingual Education Revitalization in a New Direction," December 1994, p. 1.

[181]This grant especially encourages partnerships between State and local education agencies to improve program design and assessment of student performance aligned with State plans for Title I and/or Goals 2000. *See* DOEd, "Diversity," p. 5.

[182]U.S. Department of Education, Office of Bilingual Education, "Title VII: Bilingual Education: Revitalization in a New Direction," December 1994, p. 1.

[183]DOEd, "Diversity," p. 7.

[184]James Stedman, *Improving America's Schools Act: An Overview of P.L. 103–382* (Washington, DC: Congressional Research Service, 1994), CRS Report 94–872 EPW, p. 14.

[185]Ibid.

[186]Eugene Garcia, Director of OBEMLA, U.S. Department of Education, Office of Bilingual Education and Minority Languages Affairs, memorandum to Keith Berger, Director, Strategy and Management Consulting Group, no date, Request for Organizational Approval, p. 1 (hereafter cited as DOEd, "Memo").

[187]DOEd, "Memo."

[188]DOEd, "OBEMLA Plan," p. 1. OBEMLA is aiming to build, maintain, and enhance the capacity of local education agencies, States, and State education agencies to access DOEd and other Federal agency resources to serve linguistically diverse students effectively. *See* DOEd, "OBEMLA Plan," p. 2.

[189]DOEd, "Title I and Title VII," p. 1.

[190]DOEd, "Title I and Title VII," p. 1.

[191]DOEd, "Title I and Title VII," p. 3.

[192]The Improving America's Act of 1994 requires States to review local education agency Title VII applications and provide DOEd's Secretary with comments, including whether the proposed program

Proposed Restructure of OBEMLA

Beginning in 1996, the Office of Bilingual Education and Minority Languages Affairs is proposing to perform its operations in a more collaborative and comprehensive manner, moving away from a narrow and compartmentalized structure, in which distinct units in the State and Local Programs Division administer the current six (and eventually four) grant programs discussed above.[193] The proposed restructuring plan would integrate services by organizing OBEMLA programs into "State Clusters" that would address all aspects of bilingual education and LEP students' educational needs in each cluster.[194] Many of the responsibilities formerly performed by the State and Local Programs Division would be transferred to the State clusters. The clusters would review and recommend approval of program applications; develop and implement an annual program on the provision of technical assistance to grantees; and monitor and conduct on-site program reviews, report findings, and take appropriate followup action.[195] However, under the proposed restructure, OBEMLA would retain several responsibilities. OBEMLA would continue to establish and implement policy and national dissemination efforts of the bilingual education programs to serve the needs of LEP students;[196] build and enhance State and local education agency capacity to provide quality education to LEP students;[197] and provide programmatic leadership to enhance and share the knowledge base of issues related to LEP students with other offices in DOEd and the education and human service community in general.[198]

Office of Educational Research and Improvement

The Office of Educational Research and Improvement (OERI) was created in 1979[199] in conjunction with the Office of Education's elevation to a cabinet-level agency. At that time, Congress declared that the Federal Government was obligated to promote quality and equity in American education.[200] Congress reported that achieving the goal of equal access to quality education would require research, data collection, and information dissemination; and the Federal Government would be obligated to provide leadership in the conduct and support of scientific inquiry into the educational process.[201]

Since its establishment OERI has had a pivotal role in research, data collection and analysis, and reporting because of its mandated focus on educational equity and quality.[202] Congress created the office to function in several capacities. It was to be the lead agency for educational research and development[203] to foster education quality and equal opportunity.[204] In addition, it was to be the sole Federal agency with responsibility for education research and development that spans all grade levels and content areas of instruction.[205]

From its nascent stages to the present, the core mission of OERI has endured, throughout reorganizations and reauthorizations. In general, as a result of the mandated responsibilities, OERI aims to direct, coordinate, and recommend policy for programs designed to expand fundamental knowledge and understanding of education,[206] promote excellence and equity in education; and monitor the state of education.[207]

Based on these goals, OERI has a number of specific duties and responsibilities. For example, it funds basic research aimed at enriching fundamental understanding of learning, teaching, and schools. It supports applied re-

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is consistent with the State's Title I plan. *See* DOEd, "Title I and Title VII," p. 3.

[193]DOEd, "Memo," p. 1. The impact of the proposed reorganization will eventually be examined by DOEd as the changes become implemented.

[194]Ibid.

[195]DOEd, "OBEMLA Plan," p. 4. In addition, The clusters will also develop a comprehensive staff development plan which includes training for all OBEMLA staff.

[196]DOEd, "OBEMLA Plan," p. 1.

[197]Ibid., pp. 1–2.

[198]DOEd, "Memo," p. 2. In addition, the director of OBEMLA would continue to serve as the principal advisor to the Secretary on DOEd matters related to the education of linguistically and culturally diverse students, as well as coordinate and recommend policy on bilingual education.

[199]Pub. L. No. 96–88, § 209, 93 Stat. 674.

[200]Richard Atkinson and Greg Jackson, eds., *Research and Education Reform: Roles for the Office of Educational Research and Improvement* (Washington, DC: National Academy Press, 1992), p. 59 (hereafter cited as Atkinson and Jackson, *Roles for OERI*).

[201]Ibid.

[202]Ibid., pp. 59–60.

[203]Ibid., p. 54.

[204]Ibid., p. 59.

[205]Ibid., p. 5. Since its establishment, OERI has attempted to achieve its mission in collaboration with researchers, teachers, school administrators, parents, students, employers, and policymakers. In addition, OERI has strived to support a balanced portfolio of activities, including institutionally based basic and applied research, statistical analysis, evaluation, and dissemination of information and technical assistance as well as field-initiated research and development. *See* ibid., p. 5.

[206]Atkinson and Jackson, *Roles for OERI*, p. 5. In addition, OERI was expected to advance the practice of education as an art, science, and profession. *See* ibid., pp. 59–60.

[207]Atkinson and Jackson, *Roles for OERI*, p. 5. Monitoring the state of education included assessing the national progress of education institutions, particularly for special populations. *See* ibid., pp. 59–60.

search to improve curriculum, teaching, instructional techniques, schools, and assessment.[208] OERI collects, analyzes, and disseminates statistics and other data on the status and progress of schools and education throughout the Nation, and it provides technical assistance to researchers, teachers, school administrators, and others seeking to improve education.[209] It also has other duties related to achieving education equity, directed at groups with the "greatest educational and social barriers to success."[210]

OERI's role in civil rights enforcement is limited. Formally, it has no responsibilities for civil rights enforcement. Based on DOEd's organization and division of functions, OCR is the sole office within DOEd with civil rights enforcement responsibilities. Consequently, OERI's role in civil rights functions is limited to ensuring that grant applicants have submitted a signed form assuring that they do not discriminate.[211] It also consists of reviewing and providing comment on OCR's draft regulations and policies as they may relate to OERI programmatic functions.[212] OERI does not conduct independent investigations of civil rights issues, nor does it provide technical assistance to grantees on civil rights compliance.[213] Rather, OERI refers information on noncompliance and requests for technical assistance to OCR.[214]

On an informal basis, OERI has worked with OCR to provide information on education practices useful to OCR in resolving cases.[215] In particular, OERI's regional laboratories occasionally have worked with OCR to assist OCR's negotiations for resolutions or OCR's development of technical assistance materials.[216] In addition, OERI has offered to provide OCR staff with training on education issues and practices.[217] However, the relationship between OERI and OCR has not been consistently developed or utilized. For example, OCR has not yet accepted OERI's offer to provide staff training on education, nor have OERI and OCR worked jointly to develop an ongoing technical assistance and training program for OCR.[218]

Current Structure of OERI

OERI is headed by an Assistant Secretary, who reports directly to DOEd's Deputy Secretary and Secretary.[219] The Assistant Secretary is charged with developing an overall vision of the educational research agenda. Through this collaborative process, the Assistant Secretary provides direction, coordination, and leadership to the following major entities:

- Office of the Assistant Secretary,
- Office of Reform Assistance and Dissemination,
- National Center for Education Statistics,
- Five Research Institutes,
- Library Programs and National Library of Education, and
- Media and Information Services.[220]

Office of Reform Assistance and Dissemination

The Office of Reform Assistance and Dissemination (ORAD) administers the OERI programs discussed in this chapter. ORAD is led by a director who is responsible for leadership, policy guidance, quality control, and coordination for the office. In addition to a director's office, ORAD is composed of the Knowledge-Applications Di-

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[208]Atkinson and Jackson, *Roles for OERI*, pp. 5, 59, and 60.

[209]20 U.S.C. § 6011 (1994); Atkinson and Jackson, *Roles for OERI*, p. 54.

[210]Atkinson and Jackson, *Roles for OERI*, p. 5. OERI's investments in research, development, and data dissemination address critical needs and national priorities in the areas of early childhood education, the achievement of elementary and secondary students, and strategies to teach at-risk children. Statistics and assessment programs complement the research programs and provide education-related information that is needed by States, school districts, and schools to address concerns that affect student curriculum, teaching methods, and performance measurement strategies. OERI administers direct grant programs that are designed to advance or demonstrate nationally significant strategies for improving teaching and learning, and aiding school reform, especially through the use of technology and professional development. OERI's grants for educators' investment in professional development activities should result in knowledge for teachers about instructional strategies necessary to help all students master challenging academic content, develop analytical and writing skills, and meet established standards. *See* U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information*, no date, p. 77.

[211]For example, when each applicant for financial assistance under a DOEd program completes its application package, it must sign an assurance that it will comply with civil rights laws. If the program office, in reviewing an application, receives information that an applicant or grantee may not be in compliance with civil rights requirements, the program office provides OCR with this information so that OCR can conduct followup activities. If an applicant or grantee requests from the program office information or technical assistance on civil rights issues, the program office will refer that applicant/grantee to OCR. OCR, Information Request Response, General Attachment No. 1.

[212]OCR, Information Request Response, General Attachment No. 1.

[213]Ibid.

[214]Ibid.

[215]*See* Susan Bowers, Senior Enforcement Director, and former issue coordinator on testing issues, Office for Civil Rights, U.S. Department of Education, interview in Washington, DC, May 28, 1996, p. 10.

[216]Ibid., pp. 9–10.

[217]*See* ibid., p. 10.

[218]*See* ibid., p. 10.

[219]The reorganization of OERI continues in 1996. Consequently, its impact has not been examined by DOEd.

[220]*1995 Mission Manual OERI/IO*, p. 3.

opment and Demonstration Programs Division.[221] ORAD also coordinates and manages information networks that enable educators across the Nation to communicate about effective instructional techniques.

The Development and Demonstration Division administers legislatively mandated development and demonstration programs that support education reform. The division supports professional development for teachers through funding opportunities and model demonstration programs. In addition, the division expands and modifies various demonstration programs to offer constituencies information about how various education models operate, under what conditions, and their respective beneficiaries.[222] This division supports the Star Schools Program, the Eisenhower Professional Development Program, and the Javits Gifted and Talented Students Education Grants Program.[223]

The other two divisions in ORAD are the Knowledge Applications Division and the State and Local Support Division. The Knowledge Applications Division directs and coordinates activities focused on inquiry, knowledge development, and systematic documentation of nationwide reform assistance.[224] The State and Local Support Division facilitates stronger links and connections between State and local reform initiatives and sources of assistance that are anchored in research and best practices. The division also builds an infrastructure that offers educators the skills and knowledge they need to serve as catalysts for change.[225]

National Center for Education Statistics

The National Center for Education Statistics (NCES) is the primary Federal entity for collecting and analyzing data related to education in the United States and other nations. NCES fulfills a congressional mandate to collect, collate, analyze, prepare reports, and disseminate full and complete statistics on the condition and progress of American education, at the preschool, elementary, secondary, and postsecondary levels.[226]

The data that result from NCES grants are gathered from many sources, such as administrative records, surveys of households, or longitudinal studies[227] of students within schools.[228] The data are useful for exploring specific subjects and issues connected with education. Research and data collection topics include socioeconomic status of children who reside in different local school districts, high school completions and dropouts, student progress in acquiring literacy skills, school safety, financing of education, and characteristics of education opportunities in the workplace. In addition, reported trends of data enable reforms and return on investments in education to be gauged, and serve as a basis for allocating Federal education funds.[229]

Funding levels for NCES have not changed significantly in the past 3 fiscal years and have been about $48 million, slightly under 10 percent of the OERI budget.[230]

Five Research Institutes

Title IX of Goals 2000: Educate America Act, known as the Educational Research, Development, Dissemination, and Improvement Act of 1994,[231] authorized provisions for five national research institutes to replace the Office of Research. The legislation specified that the institutes were established to fulfill the research and development purposes of OERI, and create a program of high quality and rigorously evaluated research and development that is capable of improving Federal, State, Indian tribal, and local education policies and practices.[232] Each institute funds competitive grants that foster research, in order to expand knowledge and strategies that will promote educational opportunities.[233] For 1996, $43 million is allocated to fund all five institutes.[234]

The National Institute on the Education of At-Risk Students was established to provide a coordinated and comprehensive program of research and development for the improvement of the education of students defined as "at risk" of low educational achievement or reduced academic expectations, because of limited English proficiency, poverty, race, geographic location, or economic disadvantage.[235] Approximately 30 percent of its funding is provided by federal dollars.[236]

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[221] *1995 Mission Manual OERI/ORAD*, pp. 1–2.

[222] Ibid., p. 3.

[223] DOEd, *OERI: Who We Are*, ORAD insert.

[224] *1995 Mission Manual OERI/ORAD*, p. 2.

[225] *1995 Mission Manual OERI/ORAD*, p. 2.

[226] DOEd, *OERI: Who We Are*, NCES insert; *Hearings on Appropriations* (1995), p. 1408.

[227] NCES engages in cross-sectional sample and longitudinal surveys, institutional census collections, international studies, methodological research, and special analyses. NCES also provides technical assistance to its grantees and its data recipients. *See Hearings on Appropriations* (1995), p. 1412.

[228] *Hearings on Appropriations* (1995), p. 1409.

[229] Ibid. In addition to providing statistics about the condition of and trends in education, as well as monitoring reform, NCES also must assist education agencies, organizations, and institutions in improving and automating their statistical and data collection activities, especially through cooperative endeavors. *See* ibid., p. 1408.

[230] *Hearings on Appropriations* (1995), p. 1408.

[231] Pub. L. No. 103–227, 20 U.S.C. § 6031 (1994).

[232] Ibid.

[233] DOEd, *OERI: Who We Are*, Institute insert.

[234] *Hearings on Appropriations* (1995), p. 1387.

[235] Ibid. Research topics include: methods of instruction and education practices (including community services), quality of educa-

The National Institute on Educational Governance, Finance, Policymaking, and Management addresses the roles, responsibilities, and organizational structures necessary at the school and district levels to provide the most effective educational settings. Research projects are geared to improving the equitable distribution of taxpayer funds, resources, and programs throughout the education system.[237] This institute was appropriated $4.3 million for FY 1996, 10 percent of the institutes' funding.[238]

The National Institute on Postsecondary Education, Libraries, and Lifelong Learning aims to expand knowledge about the education and training of adults in a variety of settings, including postsecondary institutions, community-based education programs, and the workplace. Activities should help accomplish the major objectives of the National Education Goal 6: That every adult American will be literate and possess knowledge and skills necessary to compete in a global economy.[239] For FY 1996, this institute was appropriated $6.5 million, which was a 15 percent share of the entire research institutes' budget.[240]

The National Institute on Early Childhood Development and Education sponsors coordinated and comprehensive research, development, and dissemination activities that will investigate services and support to improve learning; cognitive and socioemotional development; and the general well-being of children from birth through age 8 and their families.[241] The $6.5 million appropriation to this institute was 15 percent of the entire research institutes' budget.[242]

The National Institute on Student Achievement, Curriculum, and Assessment supports basic and applied research in the areas of learning, teaching, and educational accountability. The institute works to identify, develop, and evaluate innovative and exemplary methods to advance student knowledge.[243] This institute received $12.9 million for FY 1996, almost one-third of the entire research institutes' appropriation.[244]

Very little intramural research and development (R&D) is conducted within OERI. The agency plans the work to be done, solicits and reviews proposals, and monitors progress. Most of the grant funds are awarded to university-operated centers, nonprofit organizations and laboratories, professional associations, State agencies, local school districts, and the Educational Resources Information Center (ERIC) Clearinghouses.[245]

OERI in Transition: From 1994 to Present

OERI's Strategic Plan and Performance Indicators Statement[246] was released in April 1994, 1 month after the passage of the Goals 2000: Educate America Act of 1994,[247] which reauthorized OERI and mandated its present structure.[248] OERI's strategic plan was influenced by DOEd's mission to promote educational excellence and ensure equal access to high-quality education regardless of one's race, color, gender, age, disability, national origin, or social class.[249]

Congress has reported that despite national attempts to pursue this objective, equal access to education opportunities has not been achieved.[250] To address a solution, Congress reported that achieving quality education would require the attainment and dissemination of information to the public (along with technical assistance) about education through research, development, data collection,

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tional opportunities, methods of overcoming barriers to learning, innovative teacher training and professional development methods, and methods to improve the quality of education of American Indian and Alaska Native students. *See 1995 Mission Manual OERI/NIEARS*, p. 1.

[236]*Hearings on Appropriations* (1995), p. 1388.

[237]OERI, *Who We Are*, Institute insert. Topics of inquiry include innovative school design, effective approaches to organizing learning, strategies to provide vocational education, provision of financial and other rewards and incentives to schools and educators, and use of regulatory flexibility on the State or school district level. *See 1995 Mission Manual OERI/NIEFGFPM*, p. 1.

[238]*Hearings on Appropriations* (1995), p. 1388.

[239]DOEd, *OERI: Who We Are*, Institute insert. Topics of inquiry include preparing students for a lifetime of work; methods of assessing and evaluating individual, program, and institutional performance; and the uses and applications of new technologies to improve program effectiveness and enhance student learning. *See 1995 Mission Manual OERI/NIPELL*, p. 1.

[240]*Hearings on Appropriations* (1995), p. 1388.

[241]DOEd, *OERI: Who We Are*, Institute insert. Topics of inquiry include social and educational development of infants through preschoolers; the role of parents and community in promoting successful social and educational development of children from birth to age 5; socioeconomic factors that impact on children's readiness to learn, such as prenatal care, nutrition, and health services; and family literacy and parental involvement in student learning. *See 1995 Mission Manual OERI/NIECDE*, p. 1.

[242]*Hearings on Appropriations* (1995), p. 1388.

[243]DOEd, *OERI: Who We Are*, Institute insert. Topics of inquiry include student learning and assessment in academic and vocational areas; effects of organizational patterns on the delivery of instruction; and student performance standards regarding skills and subject matter. *See 1995 Mission Manual OERI/NISACA*, p. 2.

[244]*Hearings on Appropriations* (1995), p. 1388.

[245]Atkinson and Jackson, p. 60.

[246]U.S. Department of Education, Office of Educational Research and Improvement, *Strategic Plan and Performance Indicators*, Apr. 25, 1994 (hereafter cited as DOEd, *OERI Strategic Plan*).

[247]Pub. L. No. 103–277, 108 Stat. 125.

[248]*Id.*

[249]DOEd, *OERI Strategic Plan*, p. 1. *See also* 20 U.S.C. § 6011 (1994).

[250]20 U.S.C. § 6011 (1994).

and analysis.[251] The Federal Government would need to assume responsibility and to supplement State and local efforts, in conducting and supporting scientific inquiry into the educational process.[252]

Consequently, in the strategic planning stages of the reorganization of the mid-1990s (which began to be implemented in October 1995), OERI reiterated its mission to provide national leadership in the development and use of knowledge to promote equality of opportunity and excellence in education for all students, and therefore produce and provide statistics and research for monitoring, understanding, and improving education.[253] OERI developed 12 objectives centered around four goals:

- To expand the Nation's fundamental knowledge and understanding of education through research and analysis (pursued by two objectives);[254]
- To provide statistics and research for monitoring, understanding, and improving education (pursued by three objectives);[255]
- To promote research-based reform at all education levels (pursued by four objectives);[256] and
- To transform OERI into a high-performance organization distinguished by customer focus and work satisfaction (pursued by three objectives).[257]

Along with OERI's strategies to achieve the 12 objectives and performance criteria were an effort of at least 150 OERI staff, which began in the fall of 1993.[258]

The Reauthorized OERI

With the reauthorization of OERI in 1994, the office continues to provide national leadership for educational research and statistics and promote excellence and equity in American education by consistently pursuing the several endeavors related to improving the quality of education available and ensuring access to equal educational opportunity for all individuals. OERI conducts basic and applied research on teaching and learning processes; economic, social, and policy contexts of education; and other issues of high priority.[259] It collects and analyzes statistical data on the present condition and progress of schools and education throughout the Nation, and project educational trends.[260] It demonstrates and disseminates new knowledge and practices in educational research.[261] It also provides technical assistance to researchers, teachers, education administrators, and others aiming to improve education.[262]

Some of OERI's current key research, analysis, and data dissemination programs related to elementary and secondary education include the following:

- Dwight D. Eisenhower Professional Development National Activities Program;
- Jacob K. Javits Gifted and Talented Students Education Program;
- Star Schools Program;
- National Challenge Grants for Technology in Education;
- Fund for the Improvement in Education;
- Collection of data on students, teachers, assessment procedures, achievement, academic curriculum, and other issues that result in longitudinal studies such as *Schools and Staffing*; periodic surveys such as the *National Household Education Survey*; and statistical compilations such as the *Digest of Education Statistics* and the *Condition of Education*;[263] and
- Field initiated studies in which the specific topics and methods of study are determined by the investigators.[264]

In fiscal year 1995, OERI's appropriation was approximately $500 million, up from $439 million in 1994 and $414 million in 1992.[265] Approximately $540 million

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[251]Ibid.

[252]Ibid.

[253]DOEd, *OERI Strategic Plan*, p. 2; and 20 U.S.C. § 6011 (1994).

[254]DOEd, *OERI Strategic Plan*, p. 3.

[255]Ibid., p. 4.

[256]Ibid., p. 5.

[257]DOEd, *OERI Strategic Plan*, p. 6.

Each objective had various accompanying performance indicators. As an example, the second objective for goal 3 was to "foster high-quality career-long professional development for all educators at all education levels." As a performance indicator, the Eisenhower National Program activities should be aligned with important initiatives of the Eisenhower State Program administered in DOEd's Office of Elementary and Secondary Education. Objective 3 for Goal 3 (regarding the development and promotion of the use of knowledge to improve teaching, learning, and management in schools) alludes to the Star Schools Program. DOEd, *OERI Strategic Plan*, p. 8.

[258]Rod McCowan, Assistant Secretary for Human Resources, memorandum to Sharon Robinson, Assistant Secretary for Educational Research and Improvement, Apr. 25, 1994, Submission of Strategic Plan for Office of Educational Research and Improvement, p. 1, part of OERI Plan.

[259]*1992 Mission Manual OERI/INT*, p. 1.

[260]Ibid.

[261]Ibid.

[262]Ibid., p. 2.

[263]U.S. Department of Education, Office of Educational Research and Improvement, *Who We Are and What We Can Do for You*, no date, NCES insert (hereafter cited as DOEd, *OERI: Who We Are*); *Hearings on Appropriations* (1995), pp. 1408–15.

[264]*Hearings on Appropriations* (1995), p. 1388.

[265]U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information*, no date, p. 77; Ray Hamilton, Budget Officer, DOEd Budget Service/Policies and Procedures, telephone interview, Jan. 26, 1996, p. 2.

has been requested for 1996.[266] In 1995, OERI had 367 FTEs, a decline of 81 since 1992.[267]

OERI's Programs

Jacob K. Javits Gifted and Talented Grants Program

The Jacob K. Javits Gifted and Talented Grants Program[268] was authorized under the Elementary and Secondary Schools Act of 1965, Title IV, Part B, Sections 4101–4108, as amended, in the Hawkins-Stafford Elementary and Secondary Amendments of 1988.[269] The program is currently administered in the Office of Reform Assistance and Demonstration, Development and Demonstration Division.

The program's objective is to fund research and demonstration projects that build schools' capability to (a) identify and assess gifted and talented students, (b) identify alternative ways of preparing teachers to provide quality education to gifted and talented students; and to (c) design challenging curricula, standards, and instructional methods to serve these students.[270] Efforts of research, development, personnel training, and similar activities are intended by Congress to contribute to a nationwide capability in the elementary and secondary schools to meet the special education needs of gifted and talented students.[271] Specifically, ORAD compiles the program grantee (research and demonstration project) endeavors' results into a comprehensive nationwide data base and research archive on model programs and exemplary education practices that identify and educate/serve gifted and talented students.

The Secretary of DOEd expressed that experience and knowledge acquired in developing and implementing programs for gifted and talented students can and should be used as a basis for developing challenging curricula for all students and for designing instructional strategies and other means to improve all students' education.[272] DOEd supports the theory that research on gifted and talented students can provide all students with important and challenging subject matter to study and encourage the habits of hard work.[273]

Hence, the program funds can be used by grantees who aim to (a) develop programs that adapt strategies designed for gifted and talented students to serve all students; (b) adapt and expand existing programs for gifted and talented students to serve all students in a school or group of schools; and (c) implement innovative approaches, such as cooperative learning and peer tutoring, which are found in programs that serve gifted and talented students, for use in programs that serve all students in a school.[274]

DOEd aims to design and implement programs that address the needs of economically disadvantaged and minority students who have access to fewer advanced educational opportunities and whose talents often go unnoticed.[275] Consequently, OERI's priority in making awards is given to methods that identify gifted and talented students who are missed and historically underrepresented by the traditional assessment methods.[276] These students include those who are economically disadvantaged and/or limited in their English proficiency; or have physical, emotional, or cognitive disabilities.[277] In addition, OERI intends to fund demonstration education programs that include gifted and talented students from the historically underrepresented groups.[278] Currently, an OERI/ORAD grantee is studying the progress of gifted students who are not served by special programs.[279]

For the past 5 fiscal years, approximately $10 million has been appropriated to the Jacob Javits Program to fund 32 projects (about two-thirds as new grants) each year.[280]

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[266]Ibid.

[267]Linda DelPiano, Branch Chief, DOEd Budget Service/Administrative Budget and Control Board, telephone interview, Jan. 26, 1996, p. 2.

[268]Gifted and talented students are defined as "children and youth who give evidence of high performance in areas such as intellectual, creative, artistic, or leadership capacity, or in specific academic fields, and who require services or activities not ordinarily provided by the school in order to fully develop such capabilities." *See* DOEd, *1993–1994 Biennial Report*, p. 618-1.

[269]Pub. L. No. 100–297, § 2151, 102 Stat. 130.

[270]U.S. Department of Education, Office of Educational Research and Improvement, "Jacob K Javits Gifted and Talented Students Education Program: Grants, Leadership, and Research," brochure, pp. 2–3, no date (hereafter cited as DOEd, "Javits brochure").

[271]*Catalog of Assistance*, p. 916.

[272]U.S. Department of Education, *Application for a Grant: The J.K. Javits National Educational Research and Development Center for Gifted and Talented Education*, no date, p. 5.

[273]60 Fed. Reg. 20322–20323 (1995).

[274]*Catalog of Assistance*, p. 916. Funds can also be used to strengthen the capability of State education agencies and higher education institutions to provide leadership and assistance to local education agencies and nonprofit private schools. Awards also are encouraged for grantees who are attempting to establish and operate nontraditional demonstration programs, such as cooperative programs involving business, industry, universities and colleges, nonprofit institutions and other organizations.

[275]DOEd, *1993–1994 Biennial Report*, p. 618-3.

[276]Ibid., p. 618-1.

[277]Ibid.

[278]Ibid.

[279]Ibid., p. 618-2.

[280]DOEd, *1993–1994 Biennial Report*, p. 618-1; *Hearings on Appropriations* (1995), pp. 1436–37.

applications are judged by Federal and non-Federal peer review.[281] Eligible applicants include State and local education agencies, institutions of higher education, other public and private agencies, and organizations (including Indian tribes).[282]

Dwight D. Eisenhower Professional Development Federal Activities Program

This program was authorized under the Elementary and Secondary Education Act of 1965, Title II, Part A, as amended.[283] The forerunner to the Federal Professional Development Activities Program was the Dwight D. Eisenhower Mathematics and Science Education Program established in 1988.[284] The national program was officially recognized in the Excellence in Mathematics, Science, and Engineering Education Act of 1990[285] and is currently administered by the Office of Reform Assistance and Demonstration, Development and Demonstration Division.

The Eisenhower Federal Activities Program is based on OERI's recognition that supporting the educational research infrastructure must include a concentrated focus on developing and enhancing the talent and productivity of all members of the education community. The research grants inspire instructional innovation, facilitate systemic change, and offer teachers authentic opportunities to hone their professional skills and expand their intellectual horizons.[286]

The program's objective is to fund research and demonstration projects of national significance that address strategies related to (a) enhancing the quality of teaching and instruction in elementary and secondary mathematics and science, (b) improving the equality of access to instruction in these core areas, and (c) identifying effective teaching methods and curriculum content conducive to student learning.[287]

Results of research, development, and similar endeavors are intended to provide both prospective and experienced teachers (a) the opportunity to learn the content and pedagogy necessary to teach high standards, and (b) the facility to examine models of organizational arrangements in schools conducive to student learning in core academic subjects, particularly in mathematics and science.[288] In addition, results of grantee endeavors should enable OERI to establish a comprehensive nationwide data base and research archive containing exemplary elementary and secondary mathematics and science education instructional materials on pedagogy, curriculum content, and methods of student assessment.[289]

Program funds can be used by grantees who aim to (a) develop and implement (through demonstration projects) strategies that improve the skills and preparation of teachers who assist students in mastering challenging academic standards in basic subjects;[290] (b) establish comprehensive statewide reform of initial teacher preparation in various content areas, including preservice preparation and induction into teaching; and (c) develop a network(s) that would provide opportunities for educators to interact about teaching and learning and share effective instructional strategies.[291]

In addition, the Eisenhower Federal Activities Programs is providing ongoing support for such programs as, a national clearinghouse for mathematics and science that compiles and disseminates instructional and programmatic materials to elementary and secondary schools,[292] and the National Board for Professional Teaching Standards.[293]

Eligible grantees include State and local education agencies, institutions of higher education, and public and private nonprofit organizations (including museums, zoos, libraries, and professional mathematics and science associations).[294]

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[281] *Catalog of Assistance*, p. 917.

[282] Ibid., p. 916.

[283] Pub. L. No. 89-10, § 20001, as added Pub. L. No. 103-382, § 101, 108 Stat. 3612.

[284] Pub. L. No. 89-10, title II, as added Pub. L. No. 100-297, § 1001, 102 Stat. 219-227. Part A, Section 2012.

[285] Pub. L. No. 101-589, 104 Stat. 2881.

[286] *Hearings on Appropriations* (1995), p. 395.

[287] *Catalog of Assistance*, p. 891.

[288] U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information*, no date, p. 80; *Hearings on Appropriations* (1995), pp. 1417-18; and DOEd, *1993-1994 Biennial Report*, p. 614-2.

[289] These materials can be disseminated to elementary and secondary teachers, administrators, and parents. Furthermore, the Eisenhower Federal Activities Program should address issues concerning the third, fourth, and fifth National Education Goals in which all children are competent in core subjects and first in the world in math and science, and educators are receiving appropriate professional development to enable students to reach high standards. *See Catalog of Assistance*, p. 891.

[290] DOEd, *1993-1994 Biennial Report*, p. 614-1.

[291] *Hearings on Appropriations* (1995), p. 1418. The networks could be technology based, include a variety of other strategies, and be developed and implemented in collaboration with teacher institutes, professional associations, and others. Networks can be statewide, regional, or national. *See* ibid., p. 1418; U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information*, no date, p. 80.

[292] *See* 20 U.S.C.A. § 6622(a)(2),(b)(3)(B)-(C) (West Supp. 1996).

[293] 20 U.S.C.A. § 6622(c)(11) (West Supp. 1996).

[294] Criteria for selecting proposals include meeting the purposes of the authorizing statute, extent of need for the project, plan of operation, quality of key personnel, budget and cost-effectiveness,

Awards are made annually, on a competitive basis, and applications are judged by Federal and non-Federal peer review.[295] Partnerships that demonstrate ability to raise matching funds from private sources receive priority in the award of grants.[296] Between 1992 and 1994, approximately $16 million each year was allocated to this program.[297] In FY 1995, the funding level for this program was $21.4 million,[298] and in FY 1996 the funding level dropped to just below $18 million.[299]

Star Schools Program

The Star Schools program was authorized under the Elementary and Secondary Education Act of 1965,[300] as amended. The program was officially authorized in 1988[301] as a demonstration project to provide new learning opportunities for students who typically had no access to math, science, or foreign language classes.[302] Star Schools is currently administered by the Office of Reform Assistance and Demonstration, Development and Demonstration Division.

Star Schools is a distance education program that provides funds for local, statewide, or multistate entities to establish demonstration programs to (a) improve instruction for all students in mathematics, science, foreign language, and other subjects such as literacy skills and vocational education and (b) improve access by underserved populations (such as the illiterate, limited-English-proficient students, and individuals with disabilities) to high-quality mathematics and science academic programs.[303]

To attain these objectives, project funds are to be used by grantees to develop, construct, acquire, maintain, and operate telecommunications audio and visual facilities and equipment; develop and/or acquire educational and instructional programming; and obtain technical assistance in the use of such facilities and programming.[304] In addition, awards can be made to support (a) a statewide network that provides full motion two-way video and audio communications which links public colleges and universities to secondary schools; as well as (b) multistate providers of telecommunications services that have both technical and educational expertise and provide instruction in academic subjects, various types of supplemental programming, and professional development for teachers.[305]

Distance learning activities and programs can be evaluated, and the effects of different technologies used in distance learning, on student outcomes, for instance, can be compared. Knowledge attained from experimental and demonstration distance elementary and secondary instructional programs can contribute to a nationwide data base on various aspects of the education programs. Information would be available on various instructional methods and technologies for programs which would vary in scope; circumstances; beneficiaries such as geographically-isolated regular education students, LEP students, potential high school dropouts; and range of service recipients, such as one classroom, an entire school or district, to an entire statewide or regional effort. The information can be disseminated to schools, administrators, State and local education agencies, and organizations concerned about teaching and learning.

Program outcomes from 1990 to 1994 indicate that the Star Schools projects have been successful in reaching between 100,000 and 200,000 students, especially those from minority and low-income groups in both rural and urban settings.[306] In addition, more than 20,000 students received high school credit in science, mathematics, or foreign language instruction through Star Schools' en-

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evaluation plan, and adequacy of resources. *See Catalog of Assistance*, p. 892.

[295] *Catalog of Assistance*, p. 891. No award can exceed $ 500,000 dollars. *Hearings on Appropriations* (1995), p. 1417.

[296] *Hearings on Appropriations* (1995), p. 1417.

[297] DOEd, *1993–1994 Biennial Report*, p. 614-1.

[298] "Fiscal Year 1996 Congressional Action", May 3, 1996, p. 18 (OCRE files).

[299] "Fiscal Year 1997 Congressional Action", September 12, 1996, p. 15 (OCRE files).

[300] Pub. L. No. 89–10, § 3201, as added Pub. L. No. 103–382, § 101, 108 Stat. 3654.

[301] Pub. L. No. 98–377, title IX, as added Pub. L. No. 100–297, § 2302, 102 Stat. 320.

[302] DOEd, "Star Schools: U.S. Department of Education's Quality Instruction through Distance Education Technologies," no date, p. 1.

[303] *Catalog of Domestic Assistance*, p. 914. Overall, grant funds are intended to establish powerful new learning opportunities for students in schools that could not otherwise provide this instruction. All prospective grantees must determine in advance (during application stage) the intended contributions of their project toward the following: achieving the national education goals, providing students with opportunities to learn challenging State standards, assisting with State and local school modifications, and helping build a high-quality system of lifelong learning. *See* U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information*, no date, pp. 81–82.

[304] *Hearings on Appropriations* (1995), p. 1425.

[305] Ibid., pp. 1425–26. Grant funds can also establish and maintain special local networks to demonstrate a high-technology program that includes two-way audio, video, and text communications and links elementary and secondary schools with colleges and universities, as well as business, industry, and parents; family education and staff development programs; and telecommunications programs for continuing education services that provide on-line access to educational services leading to a secondary school diploma. *See Hearings on Appropriations* (1995), pp. 1425–26.

[306] *Hearings on Appropriations* (1995), p. 1426.

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deavors. Over 200,000 students have participated in hands-on science experiments, instructional modules, electronic field trips, and other activities. Nearly 50,000 teachers have participated in staff development activities funded under the program.[307]

Eligible Star Schools Program grant recipients are restricted to: (a) public agencies/corporations established to develop and operate telecommunications networks to enhance instructional and learning opportunities provided by education institutions, teacher training centers, or other entities; and (b) partnerships that are comprised of at least three participants, one of which must be a State or local education agency that serves a significant number of elementary and secondary schools eligible for Title I assistance.[308] At least 50 percent of Star School funds during any 1 year must be used to serve local education agencies eligible to receive Title I, part A, funds.[309]

Funds have increased from slightly over $14 million in 1991 to almost $23 million 2 years later, to $30 million by 1995.[310] In dollars adjusted for inflation, in a 4-year period, between 1991 and 1995, appropriations for Star Schools increased by 91 percent. From 1991 to 1994, between 10 and 13 statewide and local demonstration, dissemination, and partnership grants have been funded.[311] A grant can be issued for up to $10 million in any 1 fiscal year, but $3 million is the annual average.[312]

Office of Elementary and Secondary Education

The Department of Education Organization Act (DEOA) created the Office of Elementary and Secondary Education (OESE) in 1979.[313] The act provided for an Assistant Secretary to head the Office of Elementary and Secondary Education.[314] The OESE's predecessor, however, the Bureau of Elementary and Secondary Education, created under the Elementary and Secondary Education Act (ESEA) of 1965,[315] originally served to administer the ESEA's support for schools in low-income communities.[316]

From 1965 to 1979, the Bureau of Elementary and Secondary Education administered the ESEA. The bureau's structure consisted of five divisions, three of which served to actually administer the ESEA. The Division of Program Operations administered Title I payments to State education agencies for grants to local school districts for the education of children from low-income families.[317] The Division of Plans and Supplementary Centers administered grants under Titles II (i.e., grants for acquisition of school library resources, textbooks, and other published materials for children and teachers in public and private schools, including church-related K–12 schools). This division also administered Title III grants (funds allocated to localities to develop education centers and services they would not have financed with their own resources). The Division of State Agency Cooperation was charged with administering Title V money for strengthening State departments of education.[318]

In 1979, with the passage of the Department of Education Organization Act,[319] the Bureau of Elementary and Secondary Education became the Office of Elementary and Secondary Education.[320] As DOEd's second largest division, OESE manages various congressionally mandated programs that provide financial assistance to public and private schools. Many programs are currently administered based on the passage of ESEA and its eight subsequent reauthorization programs geared to helping all K–12 children regardless of race, gender, or disability.[321]

The ESEA represents a major legislative effort that has continued for over 30 years to improve the Nation's education and lives of students, their families, and communities.[322] Since 1965, the ESEA has stood for the Federal Government's recognition that Federal assistance to elementary and secondary education must primarily focus on the students who are the most vulnerable to receiving a poor education: those living in low-income communities

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[307]DOEd, *1993–1994 Biennial Report*, p. 617-2.

[308]*Catalog of Assistance*, p. 914.

[309]Ibid. Awards are made on a competitive basis for up to 5 years. DOEd staff and non-Federal professionals review the applications. During the 1990s, there have been substantial increases in appropriations for the Star Schools Program. *See* ibid.

[310]*Hearings on Appropriations* (1995), p. 1426.

[311]*Hearings on Appropriations* (1995), p. 1427.

[312]*Catalog of Assistance*, p. 915.

[313]Pub. L. No. 96–88, § 204, 93 Stat. 674.

[314]*Id.*

[315]Pub. L. 89–10 (1965).

[316]Stephen Bailey and Edith K. Mosher, *ESEA: The Office of Education Administers a Law* (Syracuse: Syracuse University Press, 1968), p. 91.

[317]Bailey and Mosher, *The Office of Education Administers a Law*, p. 92.

[318]Ibid.

[319] Pub. L. 96–88, 93 Stat. 668.

[320]Pub. L. No. 96–88, § 204, 93 Stat. 674.

[321]U.S. Department of Education, *Improving America's Schools Act of 1993*, "What ESEA Does," Introduction Section (September 1993), p. 1 (hereafter cited as DOEd, "What ESEA Does," Section name).

[322]DOEd, "What ESEA Does," Introduction Section, p. 2.

under conditions of economic disadvantage.[323] ESEA was one of the first statutes to address the supplemental program needs of students who are at-risk students for education failure . ESEA gave special attention to education problems of low-income youngsters isolated in urban and remote rural pockets of poverty, attending poorly funded schools, and enabled them to enter into the dialogue about elementary and secondary education.

Since its inception, ESEA has aimed to provide funding sources, programs, and resources to eliminate or minimize the impact of students' particular deprivations and potential risk factors that hinder the ability to perform at maximum potential and receive a high-quality education. Some of these deprivations include: low household income, parents' lacking literacy skills and education, and poor academic achievement. Potential risk factors include: lack of interest in achievement in subjects such as math and science, poor concentration and apathy towards coursework, absenteeism, truancy, and delinquency.[324] Over time, other programs in addition to those for economically disadvantaged students have been added to OESE's agenda to support school improvements that can benefit a variety of students, parents, teachers, and other participants in the education community (e.g., females and minorities needing encouragement in math and science, potential and current students attending magnet schools throughout the country, and teachers enhancing their professional development in math and science curricula through the Dwight D. Eisenhower Mathematics and Science Education State Grants Program.)[325] Some of the key elementary and secondary programs currently administered by OESE are:

- Education of Disadvantaged Children Formula Grants to Local Agencies
- Even Start Program[326]
- Magnet Schools Assistance
- Women's Educational Equity
- Dwight D. Eisenhower Professional Development State Grants Program
- Education for Homeless Children and Youth
- School Dropout Demonstration Assistance Program.[327]

The OESE programs reach beyond the 51 million K–12 students (14 million in grades 9–12; 37 million in grades K–8) in 15,000 school districts at 110,500[328] elementary and secondary schools (84,500 public).[329] For instance, programs exist for the 3 million K–12 teachers,[330] (such as the Dwight D. Eisenhower Professional Development State Grants Program), parents of students, and the over-400,000 high school dropouts residing in the United States.[331] Moreover, some programs authorized by ESEA (such as the Magnet Schools Assistance Program) encourage participation of families, and involve partners in the communities, including health and social services and nonprofit organizations.[332] A primary goal for elementary and secondary education is to improve DOEd's capacity to better serve States and communities as they address education concerns.

In fiscal year 1995, OESE's appropriation was $9.37 billion, up from $9.2 billion in 1992.[333] For that same year, the office had 203 FTEs, a decline of 51 since 1992.[334] Although the Federal Government contributes only 6 percent of the Nation's elementary and secondary school dollars, most of it under ESEA, this "small contribution" enables DOEd's OESE to offer leadership and a partnership in K–12 programs and policies.[335] Within the

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[323]Ibid.

[324]Ibid., p. 14.

[325]Ibid., pp. 1–2.

[326]In 1995, no funds were requested under this heading. Under the administration's fiscal year 1996 budget request, Even Start is proposed for consolidation with Adult Education and Family Literacy programs in the Vocational and Adult Education Account. DOEd reports that combined funding streams for adult education and family literacy programs will give States the flexibility to operate programs that address learners' needs more comprehensively. *See Hearings on Appropriations* (1995), p. 690.

[327]This program formerly provided grants to local education agencies, community-based organizations, and education partnerships to support demonstration projects to reduce the number of students who do not complete elementary and secondary school.

Since 1992, funding has consistently decreased for this program (from a $40 million budget in 1992 to $28 million in 1995). No funds are requested in FY 1996 for this program. Apparently, the School Dropout Demonstration Assistance Program has evolved into a program of direct, noncompetitive assistance to incumbent grantees, rather than a demonstration program, and its continuation is no longer justified. *See Hearings on Appropriations* (1995), p. 802.

[328]*Hearings on Appropriations* (1995), p. 19.

[329]Ibid.

[330]U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics 1994*, table 4 (October 1994), p. 13 (hereafter cited as NCES, *Digest*).

[331]Ibid., table 372, p. 402.

[332]DOEd, "What ESEA Does," Introduction Section, p. 3.

[333]Ray Hamilton, Budget Officer, DOEd Budget Service/Policies and Procedures, telephone interview, Jan. 26, 1996, p. 2.

[334]Linda DelPiano, Branch Chief, DOEd Budget Service/Administrative Budget and Control Board, telephone interview, Jan. 26, 1996, p. 2.

[335]DOEd, "What ESEA Does," Introduction Section, p. 4; and Iris Rotberg and James Harvey, *Federal Policy Options for Improving Education of Low Income Students*, vol. 1 (Santa Monica, CA:

past decade, some members of the education community have commented that programs for economically-disadvantaged students cannot be separated from one another or from the general quality of the school.[336] In fact, beginning with the 1988 Hawkins-Stafford amendments, additional features added to compensatory programs, especially Title I, encouraged program coordination with other school offerings.[337] As a result, in general, DOEd is encouraging systemic reform so that all parts of the elementary and secondary education system, at every level of government, work together to move all students (regardless of race, age, gender, English language proficiency, disability) to achieving high standards.[338] Specifically, OESE strives to coordinate its individual programs (such as Title I) more fully with one another, along with other DOEd programs (such as bilingual education), based on the child's overall educational experience.[339]

For instance, according to DOEd, integrating programs such as Title I with the Eisenhower Professional Development State Grants Program can strengthen the necessary instruction by teachers and other school staff, the assistance from districts, and the overall learning that occurs throughout the school day.[340] The issues surrounding poverty in the broader environment must be addressed in conjunction with curriculum and other academic concerns.[341] School-community connections can be strengthened by fostering integration of compensatory programs with health and social service programs, due to the greater safety, health, hygiene, and emotional problems, as well as disconnection from appropriate health care and human services, faced by children from low-income families.[342]

OESE intends to accomplish its ambitious goal to coordinate its programs with other education and social and human services while remaining supplemental (as opposed to substitute) source of funding to States, cities, and other localities. It is important to stress that Federal aid can only supplement State and local contributions to K–12 education programs.[343] Resources from the Federal Government are not (and never have been) intended to equalize education expenditures across cities, counties, or other local levels of government.[344] Compensatory grants, for instance, are designed to provide supplemental education services to participating students, based on the premise that federally funded services will compensate *at least in part* for impediments to learning associated with living in low-income communities (as addressed previously).[345]

One of DOEd's justifications of this reform is that better integration can promote incentives for economically poor, at-risk-for-low-achievementstudents to attain the high standards expected of their peers.[346] A second justification is that each Federal program—for the disadvantaged, for those with disabilities, and for students with limited English proficiency—has its own constituency, and can be fragmented, overlapping, and have insufficient funding to make a difference.[347] The cycle of "reauthorizing programs in a clockwork fashion" can prevent Congress and the executive branch from examining all of the programs serving K through 12 at one time.[348] Recent data suggests that combining funds from various education programs geared to economically disadvantaged students as a unit can reduce the number of regulations, program accounts, and target groups.[349] A third justification is that keeping track of a multitude of diverse, discrete activities, each with its guarded jurisdiction line, can hinder the school staff's responsibility for students' overall development.[350] A fourth is that stronger collaboration between education and health and social services can respond to the multiple needs of students in high poverty schools.[351]

Rand Corporation, 1993), p. 8 (hereafter cited as Rotberg and Harvey, *Federal Policy Options*).

[336]Rotberg and Harvey, *Federal Policy Options*, p. 3.

[337]Ibid., p. 6.

[338]Ibid., p. 6.

[339]Ibid., p. 3.

[340]Ibid., p. 3.

[341]Ibid., p. 3.

[342]DOEd, "What ESEA Does," Introduction Section, p. 3; and DOEd, "What ESEA Does," Title I Section, p. 11. Based on evidence from surveyed members of the education community (including chief State school officers, school superintendents, school personnel, researchers, and policy analysts), there is concern about school districts' need to fully coordinate and integrate compensatory programs to the extent feasible with other categorical programs, as well as with the currently fragmented and uncoordinated health and social services. *See* DOEd, "What ESEA Does," Introduction Section, p.3; and Rotberg and Harvey, *Federal Policy Options*, p. 11.

[343]Rotberg and Harvey, *Federal Policy Options*, p. 5.

[344]Ibid., p. 12.

[345]Ibid., p. 8.

[346]DOEd, "What ESEA Does," Introduction Section, p. 3.

[347]Ibid., p. 21.

[348]Rotberg and Harvey, *Federal Policy Options*, vol. 2, p. 24.

[349]Ibid., p. 21.

[350]Ibid.

[351]DOEd,"What ESEA Does," Title I Section, p. 6. For instance, learning can be difficult when students fear for their safety. Principals in high-poverty elementary schools are more than three times as likely to see physical conflict as a problem as principals in low-poverty schools. In addition, more than one-fifth of early elementary children are perceived by their teachers as having general health problems (which is twice the percentage in low-

OESE is making efforts to foster integration of programs that tend to operate in isolation (instead of as an integral part of the whole school), and is encouraging State grantees to submit single coherent K–12 plans to DOEd, instead of multiple, uncoordinated plans, showing how the State plans to use multiple Federal programs to move itself, school districts, and schools toward the objective of encouraging high standards for all students.[352]

OESE's role in civil rights enforcement is limited. Formally, it has no responsibilities for civil rights enforcement. Based on DOEd's organization and division of functions, OCR is the sole office within DOEd with civil rights enforcement responsibilities. Consequently, OESE's role in civil rights functions is limited to ensuring that grant applicants have submitted a signed form assuring that they do not discrimination.[353] It also consists of reviewing and providing comment on OCR's draft regulations and policies as they may relate to OESE programmatic functions.[354] OESE does not conduct independent investigations of civil rights issues, nor does it provide technical assistance to grantees on civil rights compliance.[355]

Rather, OESE refers information on noncompliance and requests for technical assistance to OCR.[356] For example, OCR has contact with OESE relating to magnet school assistance programs.[357] OESE may obtain data regarding civil rights compliance when it monitors grantees' projects. If OESE obtains data during its monitoring that indicates an issue of civil rights compliance, it provides that information to OCR for further action.[358]

Structure of OESE

OESE is headed by an Assistant Secretary, who provides coordination, direction, and leadership for seven program offices, as well as several internal management offices. The program offices are:

- Impact Aid Programs
- Compensatory Education Programs
- School Improvement Programs
- Office of Indian Education
- Office of Migrant Education
- Safe and Drug-Free Schools Programs
- Goals 2000 Programs[359]

The Safe and Drug-Free Schools Programs and Goals 2000 Programs reflect OESE's October 1995 reorganization. Under this reorganization, each program office except Goals 2000 will be comprised of at least one regional service team to *coordinate* the delivery of services and implement programs administered by OESE through crosscutting coordination and collaboration among OESE programs and among the regional service teams.[360] The teams have primary responsibility for cross-functional activities in order to deliver services to the customers (e.g., State and local educational agencies) of various programs within OESE.[361] Each regional service team has generic responsibilities such as providing technical assistance to grantees and applicants through onsite program reviews, correspondence, telephone contact, workshops, meetings, and conferences;[362] analyzing the needs of the State and local Education Agencies (SEAs and LEAs) and other entities receiving funding and evaluating the overall effectiveness of the programs.[363]

The Compensatory Education Programs and School Improvement Programs administer the OESE programs discussed in this chapter. The former is responsible for Title I programs; and the latter is responsible for the Magnet Schools Assistance Program, Women's Educational Equity Program, and the Eisenhower Professional Development State Grants Program.[364]

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poverty schools). Yet, there is a tendency in the "culture of poverty" to remain disconnected from existing health care services.

[352]DOEd, "What ESEA Does," Introduction Section, p. 2.

[353]For example, when each applicant for financial assistance under a DOEd program completes its application package, it must sign an assurance that it will comply with civil rights laws. If the program office, in reviewing an application, receives information that an applicant or grantee may not be in compliance with civil rights requirements, the program office provides OCR with this information on which OCR can then conduct follow-up activities. If an applicant or grantee requests from the program office information or technical assistance on civil rights issues, the program office will refer that applicant/grantee to OCR. OCR, Information Request Response, General Attachment No. 1.

[354]OCR, Information Request Response, General Attachment No. 1.

[355]Ibid.

[356]Ibid.

[357]Ibid., "Office of Elementary and Secondary Education," no. 7.

[358]Ibid.

[359]*1995 Mission Manual OESE/INT*, p. 2.

[360]Ibid.

[361]*1995 Mission Manual OESE/REGIONAL*, p. 1.

[362]Ibid.

[363]Ibid. Additional generic duties include recommending modifications in policies and priorities in order to improve effectiveness to meet the needs of SEAs and LEAs; conducting integrated review of educational reform and compliance with respect to applicable laws and regulations, reporting all findings, and taking appropriate action to help meet these needs; clarifying and providing interpretations of OESE policy decisions to States and other grantees; and reviewing and recommending approval of State education agency plans and applications.

[364]*1995 Mission Manual OESE/CEP*, p. 1; and *OESE/SIP*, p. 1.

OESE'S Mission and Responsibilities

OESE's mission charges the office with:

- Assisting State and local education agencies in improving achievement of elementary and secondary students and assuring equal access to services for all children. Special attention is given to economically disadvantaged youngsters, as well as native Americans and children of migrant workers;[365]
- Assisting State and local education agencies in the process of school desegregation; and
- Assisting K–12 teachers in improving the quality of their teaching.[366]

Compensatory Education Programs

The Compensatory Education Programs (CEP) office is headed by a Director who reports directly to the Assistant Secretary for Elementary and Secondary Education. The office promotes cooperative efforts among various governmental and community officials on matters concerning effective program administration.[367] The Director also provides overall leadership and coordination for one or more regional service teams.[368] CEP provides financial assistance to local and State education agencies for institutionalized, neglected, delinquent, homeless, and some Indian children.[369] CEP has a program service team and regional service teams.

The program service team is responsible for several functions. It prepares program budgets, including analyses of alternative levels of appropriations for Title I; it works closely with the National Center for Education Statistics and checks the data NCES provides for the allocation of Title I funds;[370] it prepares Title I grant awards and allocation tables for SEAs and notifies Congress of these awards. It also makes the awards.[371]

In addition to these generic functions, the CEP teams have CEP-specific responsibilities. They focus on issues related to the systemic school reform envisaged in the Goals 2000 and the Improving America's Schools Act.[372] They receive and review annual reports from the States on expenditures and activities and prepare summary reports. They also disseminate information on preschool, elementary, and secondary programs; early childhood programs; parental involvement; Title I program improvement and evaluation; and information on effective educational practices for educationally disadvantaged children.[373]

School Improvement Programs

The School Improvement Programs office (SIP) administers a wide variety of programs authorized under the Improving America's School Act of 1994.[374] Programs address concerns that can benefit an entire student body and range from providing safe and drug-free schools, promoting equal access to all courses (especially mathematics and science), fostering teacher development, and purchasing of textbooks.[375]

SIP is led by a Director who reports to the Assistant Secretary and/or Deputy Secretary for Elementary and Secondary Education.[376] The Director also oversees one or more regional service teams. SIP establishes cooperative relationships with the Office of Educational Research and Improvement to facilitate dissemination of effective practices and to coordinate research activities supported by the Women's Education Equity Act.[377]

SIP also has a program service team. The program service team has several responsibilities: it manages the award process, including solicitation, review, evaluation, and documentation of all applications for funding;[378] develops and coordinates policies and procedures for SIP including data collection and analysis; formulates regulations and issues policy statement; and develops information on underrepresented populations.[379] In addition to

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[365] *1995 Mission Manual OESE/INT*, p. 1.

[366] Ibid., p. 2.

[367] *1995 Mission Manual OESE/CEP*, p. 1.

[368] Ibid.

[369] The programs are designed to meet special education needs of such children and to aid in their continued development to full potential; and to assist in their teachers' continued professional development that enables these children to achieve the State's high, challenging academic content and performance standards expected of all children. *See 1992 Mission Manual OESE/CEP*, p. 1; and *1995 Mission Manual OESE/CEP*, p. 1.

[370] *1995 Mission Manual OESE/CEP*, p. 2.

[371] Ibid. In addition, the program service team also provides for integration, coordination, and implementation of DOEd and OESE strategic plans and Goals 2000, and prepares and tracks performance indicators.

[372] *1995 Mission Manual OESE/CEP*, p. 3.

[373] Ibid.

[374] *1995 Mission Manual OESE/SIP*, p. 1.

[375] *1992 Mission Manual OESE/SIP*, p 2. The programs provide assistance to State and local education agencies, institutions of higher education, and other public and private nonprofit organizations. Administration of these programs involves administering grants, payments, and contracts; monitoring program compliance with statute and regulations; providing technical assistance to grantees; developing and designing operating programs; and participating in the formulation and development of program policy and legislative proposals. Ibid., p 2.

[376] *1992 Mission Manual OESE/SIP*, p. 2.

[377] Ibid.

[378] Ibid.

[379] Ibid., p. 3.

responsibilities. For example, it develops and implements an annual program of monitoring and technical assistance;[380] monitors grantees/contractors;[381] and it provides technical assistance to funded and potential grantees/contractors. The team also manages the process of identifying successful K–12 and higher education practices supported by SIP programs that contribute to the quality of education nationwide.[382]

OESE Programs that Promote Equal Educational Opportunity

Title I Grants to Local Education Agencies

This program was authorized under the Elementary and Secondary Schools Act of 1965, Title I, Part A and is currently administered in the Compensatory Education Programs.

As the multibillion dollar centerpiece of ESEA, this program is an amended and extended version of prior law, Chapter 1 (from 1981 to 1994[383]), and provides Federal assistance for compensatory education of educationally disadvantaged students.[384]

The program under the reauthorized Title I, Part A, Grants to Local Education Agencies (LEAs) provides supplemental education funding to LEAs and schools, especially in high poverty areas, to help low-income, low-achieving students succeed in the regular school program, attain grade level proficiency, improve achievement in basic and more advanced skills, and learn to the same high standards as other children.[385]

Since its latest reauthorization, DOEd is promoting Title I as an integral part of State and local reform efforts, and is shifting from providing remedial instruction to a new focus on challenging curriculum.[386] DOEd is emphasizing education designed to help students meet high standards and accelerated learning rather than merely remedial instruction.[387]

Grantee Requirements. To help close the achievement gap between high and low poverty schools, Title I requires the following:

- By 1997, all States must establish or adopt a set of challenging content and performance standards that they will use as a basis for reforms at the local education agency (LEA) and school levels. All Title I instruction, assessment, and accountability will align with the standards.[388]
- By 1999, all States must have new State assessment systems in place to assess children served by Title I against the State standards. State assessments will be used to hold schools and LEAs accountable for making adequate progress towards the State standards. In addition, States will institute new incentives for school and district improvement as well as corrective actions for repeated failure.[389]

Based on the aforementioned concerns about an achievement gap between high- and low-socioeconomic schools, OESE is intensely examining Title I program's traditional instructional emphasis on rote learning, remedial mathematics, and reading drills at the expense of higher order cognitive and reasoning skills, and problem solving.[390] Compensatory education programs' aim to elevate the traditional curricula and emphasize instruction that encourages writing assignments and exercises that reflect critical, independent thinking.[391]

State and district efforts to reform Title I curricula and instruction will be measured by indicators such as exposure of students to challenging subject matter and the effectiveness of teaching practices.[392] However, State standards to guide Title I's instruction in mathematics and reading under the new law will not be officially in place until the 1997–98 school year; and States will be allowed up to the full 5 years of the 1994 reauthorization to create new assessments.[393] DOEd asserts that student performance will need to be assessed incrementally over the long term.[394] The Department considers achievement gains to be dependent on sustained programmatic and policy changes at the Federal, State, local, and school levels.[395]

In the mid-1970s, the "back to basics" movement focused on low-level skills, and instruction and tests were aligned with "minimum competence" standards.[396] Given many low-income and minority students were able to attain these standards and improve their basic skills, compensatory programs are now setting their sights higher, by moving forward with new curriculum standards, perform-

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[380]Ibid., p. 4.
[381]Ibid.
[382]Ibid.
[383]Mark Pitsch, "Report Sketches Plans for Evaluating Title I," *Education Week*, Feb. 21, 1996, p. 24.
[384]Stedman, *Improving America's Schools Act*, p. 3.
[385]*Hearings on Appropriations* (1995), p. 681; *Catalog of Assistance*, p. 811.
[386]*Hearings on Appropriations* (1995), p. 682.
[387]Ibid.
[388]Ibid. p. 681.
[389]Ibid., pp. 681–82.
[390]Rotberg and Harvey, *Federal Policy Option*, p. 3.
[391]DOEd, "What ESEA Does," Introduction Section, p. 2.
[392]Pitsch, "Report Sketches Plans for Evaluating Title I," p. 24.
[393]Pitsch, "Report Sketches Plans for Evaluating Title I," p. 24.
[394]Pitsch, "Report Sketches Plans for Evaluating Title I," p. 27.
[395]Ibid.
[396]DOEd, "What ESEA Does," Introduction Section, p. 6.

ance levels, and assessments to monitor progress in reaching those standards.[397]

Programs such as Title I will no longer hold back efforts to enrich the curriculum with more challenging material and concepts.[398] The bottom line is that children do not need to learn exclusively simple skills prior to using their ability to think and solve problems; research has demonstrated that content-rich instruction is indispensable for all children, at every stage of intellectual development.[399]

Grantee Provisions to Enable Students to Achieve High Standards. The 1994 reauthorized Elementary and Secondary Education Act (ESEA) recognizes several mechanisms to foster Title I recipients' ability to meet the high standards set for all students. Provisions have been established in the 1994 Improving America's Schools Act (IASA), Title I to:

- Develop the capacity of teachers and other educators who will help students reach those standards through intensive and sustained professional development at district and school levels;[400]
- Provide flexibility that will enable school districts and schools to make more decisions about how program resources are to be used.[401]
- Establish linkages with parents, others in the community, business and industry leaders, and other partners to enable students to learn high standards;[402] and
- Concentrate dollars (rather than spread them across virtually all school districts) where needs are greatest—the areas of highest concentrations of poor children.[403]

Because family income and education level, and student education achievement tend to be closely correlated,[404] low-income children often face a double handicap: they have greater needs than more affluent children, yet they attend schools with substantially fewer resources.[405] Some of those needs can be attributed to their likelihood to reside in typically bleak, crime-ridden, inner city neighborhoods with widespread unemployment and a

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[397]DOEd,"What ESEA Does," Introduction Section, p. 6. In fact, there is some evidence to reflect that Title I policy is stressing revised educational curricula—programs with less emphasis on supplemental basic skills that encourage the development of advanced skills. Low-income pupils are filling out fewer of the "endless" drill-and-practice worksheets, and spending more time on what their more advantaged peers do: creating stories, tackling multistep math problems, and conducting science experiments. *See* DOEd, "What ESEA Does," Introduction Section, p. 2. According to DOEd, ESEA programs do not need to perpetuate a remedial track and emphasize low-level basic skills, but can instead break this cycle and use high standards to improve schools and student performance. *See* DOEd, "What ESEA Does," Section on Title 1, p. 1.

[398]DOEd, "What ESEA Does," Section on Title 1, p. 1.

[399]DOEd, "What ESEA Does," Introduction Section, p. 2.

[400]See 20 U.S.C.A. § 6301(c)(5),(d)(4) (West Supp. 1996); *see also* Thomas W. Payzant, Assistant Secretary for Elementary and Secondary Education, U.S. Department of Education, testimony before the *Subcommittee on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Appropriations Committee*, Mar. 1, 1995, *reprinted* in U.S. Departments of Labor, Health and Human Services, Education, and Related Agencies, *Hearings on Appropriations before the Subcommittee on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Appropriations Committee*, 104th Cong., 1st sess. 67 (1995), p. 254; *see also* DOEd, "What ESEA Does," Section on Title 1, p. 1.

[401]See 20 U.S.C.A. § 6301(d)(9) (West Supp. 1996); *see also* Thomas W. Payzant, Assistant Secretary for Elementary and Secondary Education, U.S. Department of Education, testimony before the *Subcommittee on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Appropriations Committee*, Mar. 1, 1995, *reprinted* in U.S. Departments of Labor, Health and Human Services, Education, and Related Agencies, *Hearings on Appropriations before the Subcommittee on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Appropriations Committee*, 104th Cong., 1st sess. 67 (1995), p. 254; As a result of the 1994 legislation, a school's program can operate in ways that makes the most sense for K–12 students and promotes their achievement. The schools' and school districts' acceptance of more autonomy and responsibility requires their accountability for results defined by youngsters' making progress towards meeting established standards. Ibid.

[402]See 20 U.S.C.A. § 6301(c)(7), (d)(6) (West Supp. 1996); *see also* Thomas W. Payzant, Assistant Secretary for Elementary and Secondary Education, U.S. Department of Education, testimony before the *Subcommittee on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Appropriations Committee*, Mar. 1, 1995, *reprinted* in U.S. Departments of Labor, Health and Human Services, Education, and Related Agencies, *Hearings on Appropriations before the Subcommittee on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Appropriations Committee*, 104th Cong., 1st sess. 67 (1995), p. 254.

[403]See 20 U.S.C.A. § 6301(c)(11), (d)(6) (West Supp. 1996); *see also* Thomas W. Payzant, Assistant Secretary for Elementary and Secondary Education, U.S. Department of Education, testimony before the *Subcommittee on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Appropriations Committee*, Mar. 1, 1995, *reprinted* in U.S. Departments of Labor, Health and Human Services, Education, and Related Agencies, *Hearings on Appropriations before the Subcommittee on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Appropriations Committee*, 104th Cong., 1st sess. 67 (1995), p. 254.; *see also* DOEd, "What ESEA Does," Section on Title 1, p. 2; Rotberg and Harvey, *Federal Policy Options*, p. xi.

[404]Rotberg and Harvey, *Federal Policy Options*, pp. xi and 25.

[405]Ibid.

large low-income minority population or economically depressed rural areas.[406] Often the students' parents are poorly educated and trying to make ends meet while isolated, unemployed, and lacking health insurance and access to resources.[407] Consequently, schools serving many low-income students face a challenging environment and thereby need more educational resources to compensate.[408]

However, inadequate resources at the school district (and perhaps elevated to entire city or county) level cause specific schools to not be able to meet the growing needs of all of their students.[409] This is especially true for schools located in areas of high rural or urban poverty that do not have the financial resources needed to provide even a minimally adequate educational program for these children, let alone ensure that each of their pupils can attain high standards.[410]

Compensatory education programs (such as Title I) theoretically focus attention on the needs of the disadvantaged students and provide them with services that may not otherwise be available in many schools.[411] However, given these programs' multiple purposes (e.g, an amalgamation aimed at assisting low-income districts while also providing funds for low-achieving children in wealthy districts) resources tend to be spread thinly, and almost 93 percent of school districts receive funds.[412] Two-thirds of public schools, including almost one-half of very low poverty elementary schools (in which fewer than 10 percent of students are considered poor) receive these funds.[413] Yet 13 percent of high poverty schools (i.e., above 75 percent poverty) receive no compensatory education funds.[414] Consequently, more than half of Title I funds' recipients, for instance, are not poor, although many may come from low-income families.[415]

Given the concerns about the widespread distribution of funds, DOEd is aiming to improve the targeting of resources for education services to economically disadvantaged localities, schools, and students (with the aim of putting them on more equal footing with their more advantaged peers). While it would not be feasible to limit services from funding sources such as Title I only to low income students, compensatory programs are being reframed to increase resources available to the Nation's lowest income districts and schools.[416]

Title I Funding. For over a quarter of a century, Title I, Part A has evolved into a complex program that interacts with virtually every aspect of State and local education finance, administration, and education services.[417] It is the largest Federal program that operates to meet special needs in the schools.[418]

For FY 1996, $7 billion for all Title I programs will be disseminated to over 6 million educationally disadvantaged children in 50,000 high poverty schools nationwide.[419] Since the program's inception, grants to LEAs for Basic and Concentration Grants consistently have had at least a 90 percent share of Title I appropriation; and the majority (at least three-quarters) of funds to LEAs has consistently been distributed as basic grants.[420] In FY 1996, for instance, approximately $7 billion has been budgeted for basic and concentration grants to LEAs.[421] Basic grants' $5.3 billion share of this $6.7 billion LEA would result in a 13 percent decrease of the previous year's almost $6 billion appropriation.[422]

Since 1991, overall growth for LEA support has been relatively slight, due to year-to-year inconsistencies. From 1991 to 1992, funds increased from $5.6 billion to $6.1 billion, but dropped slightly the following year (by under 2 percent). Between 1993 and 1995, LEAs' appropriations increased by 12 percent to $6.6 billion. The $7 billion

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[406]Ibid.., pp. xi and 7.

[407]Rotberg and Harvey, *Federal Policy Options*, pp. xi and 7.

[408]Ibid., p. xv.

[409]Ibid.

[410]Rotberg and Harvey, *Federal Policy Options*, p. 7. Some researchers have determined low, moderate, and high achieving children in schools with large concentrations of poor children have fewer educational opportunities than do children in more affluent schools. Yet, at the same time, high quality has been sold as the solution to the Nation's economic problems. *See* Rotberg and Harvey, *Federal Policy Options*, p. 30.

[411]Rotberg and Harvey, *Federal Policy Options*, p. 36.

[412]DOEd, "What ESEA Does," Section on Title 1, p. 6.

[413]Ibid.

[414]Ibid.

[415]Rotberg and Harvey, *Federal Policy Options*, p. 17.

[416]Ibid., p. 26.

[417]Ibid., p. 6.

[418]Ibid., p. 21.

[419]Sally H. Chritenson, Deputy Assistant Secretary for Budget, Office of the Under Secretary, U.S. Department of Education, "Prepared Statement on Department of Education Budget and Programs," before the *Subcommittee on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Appropriations Committee*, Jan. 11, 1995, p. 5, *reprinted* in U.S. Departments of Labor, Health and Human Services, Education, and Related Agencies, *Hearings on Appropriations before the Subcommittee on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Appropriations Committee*, 104th Cong., 1st sess. 67 (1995) p. 68; U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information*, no date, pp. 14–15.

[420]*Hearings on Appropriations* (1995), p. 681.

[421]Ibid.; U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information*, no date, pp. 14-15.

[422]*Hearings on Appropriations* (1995), p. 681.

proposed for the entire FY 1996 represents a 46 percent increase since the beginning of the decade.[423]

Examining earlier data is instructive. In 1967, approximately $1.02 billion was appropriated to LEAs.[424] By 1975, funds for LEAs increased 59 percent to $1.59 billion, and more than doubled by 1985 to more than $3.2 billion. Between 1967 and 1992, there was a sixfold increase in LEA funds, from $1.02 billion to more than $6.13 billion.[425]

Title I is not a "program" per se, but is a source of funding that local districts and schools can use for virtually anything that appears educationally reasonable; the variety of local programs emphasized reflects the flexibility built into the legislation.[426] As long as a project is designed to provide supplemental services to meet the special education needs of educationally deprived children at the preschool, elementary, and secondary levels, the activity is encouraged.[427] Funds can be used by grantees to establish programs in the following areas, for instance: computer-assisted instruction, English as a second language, the teaching of reasoning and problem solving, early childhood activities, health and nutrition services, counseling and social services, summer activities, employment and training of special instructional personnel and school counselors, construction of school facilities, and parental participation activities.[428] The program encourages evaluation of practice.[429]

Program Eligibility and Award Levels. Regarding program eligibility, Title I, part A, funds are available to any district with 10 or more children from families below the poverty level.[430] More specific eligibility criteria as well as amount of funds, depends on the type of grant. Regarding LEA appropriations (the major share of Title I funds, as addressed earlier):

Basic grants are allocated in proportion to the number of eligible poor children aged 5 to 17 in a county (based mainly on the children from families with income below the poverty line, as reported in the decennial census), adjusted by a State per pupil expenditure, but not less than 80 percent nor more than 120 percent of the national average expenditure per pupil.[431] The number of children aged 5 to 17 in families with incomes below the poverty level obtained from the census data are not updated annually.

Concentration grants flow through the basic grants formula, except that they go only to counties and LEAs if at least 15 percent or 6,500 children aged 5 to 17 are from families with incomes below the poverty line.[432] Approximately, 66 percent of counties nationally receive these funds.[433]

In addition, schools that serve an attendance area in which not less than 60 percent of the children are from low-income families are permitted to use Title I resources to make overall improvements in their education programs (schoolwide projects) rather than limit services to selected students.[434] As of 1993, about 2,000 schools have implemented schoolwide projects, although more than 9,000 are eligible. Many of these schools do not have the level of resources required to make schoolwide projects a viable option.[435] For the school year 1996–1997 and subsequent years, the schools eligible to utilize Title I funds for schoolwide programs will be those which serve attendance areas in which no fewer than 50 percent of the children are from low-income families.[436]

School districts allocate Title I funds for:

- Classroom services: primarily salaries and benefits for educators, supplies, and equipment used in the classroom, as well as field trips and transportation.[437]
- Support services: primarily curriculum development, teacher training, activities to increase student involvement, salaries and benefits for such personnel

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[423]U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information*, no date, p. 15; and DOEd, *1993–1994 Biennial Report*, p. 101-1.

[424]DOEd, *1993–1994 Biennial Report*, p. 101-1.

[425]Ibid.

[426]Rotberg and Harvey, *Federal Policy Options*, p. 17.

[427]20 U.S.C. § 2721.

[428]Ibid.; and Rotberg and Harvey, *Federal Policy Options*, p. x.

[429]Rotberg and Harvey, *Federal Policy Options*, p. 2.

[430]"Poor children" is defined in 20 U.S.C. § 6333: "In determining the families which are below the poverty level, DOEd Secretary shall utilize the criteria of poverty used by Census Bureau in compiling the most recent decennial census, in such form as those criteria have been updated by increases in the CPI for all urban consumers (published by the Bureau of Labor Statistics)." The Title I formula uses the number of poor children as a proxy for the number of children-in-need, which in most cases, is a good approximation because children-in-need generally increase proportionally with the number of poor children. *See* U.S. General Accounting Office, *Remedial Education: Modifying the Chapter 1 Formula Would Target More Funds to Those in Need*, July 1992, p. 5.

[431]Rotberg and Harvey, *Federal Policy Options*, p. 9; and 20 U.S.C. §§ 2711–2712.

[432]Ibid.

[433]*Hearings on Appropriations* (1995), p. 682.

[434]20 U.S.C. 6314(a)(1)(A)(ii).

[435]Rotberg and Harvey, *Federal Policy Options*, p. 31.

[436]*See* 20 U.S.C. 6314(a)(1)(B)(ii).

[437]U.S. General Accounting Office, *Compensatory Education: Most Chapter 1 Funds in Eight Districts Used for Classroom Services*, September 1992, pp. 2, 12.

as counselors and truant officers, and salaries for parents.[438]

- Administration: primarily salaries and benefits for Title I coordinators, supervisors, and administrative staff; expenditures for general program operation and maintenance; indirect costs; as well as supplies and equipment used to support the program.[439]

The Dwight D. Eisenhower Professional Development State Grant Program[440]

This program was authorized under an amendment to the Elementary and Secondary Schools Act of 1965, Title II, Part A[441]—in the 1988 Hawkins-Stafford Amendments.[442] Currently, the program is administered in the School Improvement Programs. The overall program objectives are to provide financial assistance to enable educators and other school personnel (at the district and school levels) to acquire (a) the knowledge and skills needed to help all students meet high standards in core academic subjects, as well as (b) the appropriate intellectual tools for solving problems that arise.[443] Some educators stress that as teachers develop a more comprehensive knowledge of their subject matter and learn new strategies of teaching students, assessing their performance, managing the classroom, and working with parents, they are better able to teach to high standards.[444]

In the context of reauthorization, the financial assistance is broadly for Federal, State, and local efforts to stimulate and provide sustained and intensive, ongoing (from recruitment to retirement), high-quality, professional development in the core academic subjects.[445] Funds specifically must be utilized for the improvement of teaching core subject areas, such as mathematics and language arts, in elementary and secondary schools, which may include: (a) improving teacher training, retraining, and inservice upgrading of skills;[446] (b) purchasing instructional equipment, materials, and video and telecommunications technology that can foster the establishment of new or expansion of existing professional networks of teachers and other school staff;[447] and (c) acquiring technology to assist teachers and schools in providing the appropriate curriculum and instruction that will enable students to meet high standards.[448]

Eligible grantees include State education agencies (SEAs), State agencies for higher education, the Insular Areas, and Bureau of Indian Affairs. Local education agencies may apply their State.[449] The majority of Eisenhower funds (95 percent) is allocated to State education and higher education agencies on a formula basis.[450] Three-fourths of these funds are directed to SEAs.[451]

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[438]Ibid.

[439]Ibid.

[440]This program replaces the Eisenhower Math and Science Education State Grants Program, which supported teacher training only in mathematics and science. Funds were provided only for short-term inservice training. *See* U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information*, no date, p. 17.

[441]20 U.S.C. § 2981.

[442]Pub. L. 100–297, Title II, Part A, Section 2012.

[443]*Catalog of Assistance*, p. 888; and DOEd, "What ESEA Does," Introduction Section, p. 9. The program also aims to enable principals to lead schools and communities. *See* DOEd, "What ESEA Does," Introduction Section, p. 8. In addition, as reauthorized, the professional development program expects to create appropriate opportunities for teachers to have more say in school decisions. *See* DOEd, "What ESEA Does," Introduction Section, p. 9. More broadly, the Eisenhower program intends to improve the quality of the academic curriculum and instruction in public and private schools and increase the accessibility of such instruction to all students. *See Catalog of Assistance*, p. 888.

[444]DOEd, "What ESEA Does," Introduction Section, p. 9.

[445]The academic community has evidence that courses are necessary for students to achieve the National Education Goals and meet challenging State content and performance standards in mathematics and sciences. *See* DOEd, "What ESEA Does," Section on Improving Teaching and Learning," p. 2.

[446]*Catalog of Assistance*, p. 888.

[447]DOEd, "What ESEA Does," p. 10.

[448]Ibid. Grant awards may also be used by educators to attend professional conferences in mathematics and science, for projects concerning historically underrepresented populations, recruitment or retraining of minority teachers into mathematics and science, and cooperative programs designed to improve student understanding and performance in areas such as mathematics, science, social studies, and other key subjects. More than 75 percent of all program funds support direct professional development activities for teachers including in-service training. *See* DOEd, *1993–1994 Biennial Report*, p. 131-2.

[449]*Catalog of Assistance*, p. 888.

[450]U.S. General Accounting Office, *The Eisenhower Math and Science State Grant Program*, November 1992, pp. 16–17 (hereafter cited as GAO, *The Eisenhower Math and Science Program*). Of the total appropriation for the State and National Eisenhower Professional Development State Grants Program, up to one-half percent is set aside for the Insular Areas and one-half percent for the Bureau of Indian Affairs. Four percent is for national programs. *See Catalog of Assistance*, p. 888.

[451]GAO, *The Eisenhower Math and Science Program*, pp. 16–17. Each SEA retains 10 percent of the appropriation, and allocates the remaining 90 percent to participating school districts. Of the funds retained by the agency, at least 50 percent is for demonstration and exemplary projects, and not more than 50 percent is for technical assistance and administrative costs. The participating school districts distribute one-half of their funds to their respective schools based on the number of children in poverty and the other half based on relative enrollment of children between the ages of 5 and 17.

Appropriations for the State program have almost tripled in current dollars from 1985 ($90 million appropriation) to 1994 ($250 million). During this 10-year period, appropriation increases have been virtually consistent.[452] The grants to States range from $1.2 to $24 million for a 3-year duration.[453] The average award to SEAs for FY 1994 was $3.5 million.[454]

When applying for grant funds, States are required to identify their professional development needs; outline a strategy for using technical assistance to address needs; describe how the State will work with local districts, schools, and colleges/universities to ensure that high-quality support is provided in the core subjects; and monitor and evaluate the effectiveness of professional development activities.[455]

From the program's inception until the beginning of the decade, State reports to DOEd showed that rates of LEAs' participation in the Eisenhower program has varied among States.[456] According to DOEd, in 1990, 13 States had nonparticipation rates greater than 20 percent, and 5 States had nonparticipation rates above 38 percent.[457] About three-fourths of nonparticipating school districts would have been eligible for grants below $1,000.[458] Many districts did not participate because they were eligible for small grants, and they did not want to spend resources on applications and reports for a negligible amount of money.[459] As a consequence, in 1990, the program was amended to require school districts receiving less than $6,000 to form consortia to pool their funds and use them more effectively.[460] The impact of this requirement on program participation will need to be determined.

In the context of other programs geared to enabling students to meet high standards, the program serves as the Federal Government's major vehicle for supporting training to provide educators and other school personnel with the knowledge and skills needed to enable all students to meet high academic standards in core subjects.[461] OESE views especially mathematics and science as gatekeeper subjects, and accessibility by all students can be fostered if teachers improve their grasp of the subject matter and their ability to teach.[462]

Hence, OESE and the IASA encourage and support intensive, ongoing professional development for every teacher—opportunities that are substantial, systemic, in-depth, continuous, long term, and well-designed (rather than haphazard, one-shot and short-term) for teachers to develop the knowledge and skills they need.[463] The current Eisenhower Program's predecessor, the Dwight D. Eisenhower Math and Science State Grants Program, reached at least one-third of teachers responsible for math and science.[464]

Magnet Schools Assistance Program

This program was authorized under an amendment to the Elementary and Secondary Schools Act of 1965, Title V, Part A, which was called the Education for Economic Security Act, Title VII, Pub. L. 98–377, 20 U.S.C. §§ 4051–4062.

The Federal support for magnet schools[465] commenced in the 1970s, during the early stages of the effort to desegregate schools. School desegregation programs were expanding during this time, and in 1976 the Federal Government was beginning to include support for planning and implementing magnet schools.[466] Major Federal support for magnet schools was initiated in 1985 through the Education for Economic Security Act, Title VII,[467] which authorized grants to support planning for and implementation of magnet schools undergoing desegregation.[468] The program was created to support local projects aimed at integrating student bodies and creating or operating of high quality educational programs.[469] The magnet schools assistance program (MSAP) is currently administered in School Improvement Programs.[470]

This program provides grants to LEAs to establish and operate magnet schools that are part of a court-ordered or federally approved desegregation plan to

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[452]DOEd, *1993–1994 Biennial Report*, p. 131-1.

[453]*Catalog of Assistance*, p. 889.

[454]Ibid.

[455]*Ibid.*, p. 888.

[456]GAO, *The Eisenhower Math and Science Program*, p. 6.

[457]Ibid.

[458]Ibid.

[459]Ibid.

[460]A consortium is formed when a district agrees to combine its Eisenhower funds with those of at least one other district and/or with a higher education institution. *See* ibid., p. 7.

[461]*Hearings on Appropriations* (1995), p. 255.

[462]Ibid., p. 411.

[463]DOEd, "What ESEA Does," Introduction Section, pp. 3, 8.

[464]Ibid., p. 8.

[465]A "magnet school" is an elementary or secondary school or education center that offers a special curriculum capable of attracting substantial numbers of students of different racial background. 20 U.S.C. § 3025 (1988).

[466]DOEd, "What ESEA Does," Section on Magnet Schools, p. 1.

[467]Pub. L. No. 98–377, 20 U.S.C. §§ 4051–4062, created the magnet schools assistance program in 1985; and in 1994 the program was reauthorized in the Improving America's Schools Act (Pub L. No. 103–382, 20 U.S.C. §§ 7201–7213).

[468]20 U.S.C. § 7202.

[469]DOEd, "What ESEA Does," Section on Magnet Schools, p. 1.

[470]1995 *Mission Manual OESE/SIP*, p. 1.

eliminate, reduce, or prevent minority group[471] isolation in elementary or secondary schools[472] with substantial proportions of minority students.[473]

Magnet schools offer special curricula designed to attract substantial numbers of students from different socioeconomic, ethnic, and racial backgrounds, and bring them together.[474] That is, support for magnet school programs is intended to serve a variety of students, rather than an elite student body.[475] According to DOEd, magnet schools have been highly popular with students, parents, and school districts; the number of these schools operated in LEAs has more than doubled over the last decade.[476] In fact, research has identified a significant need for magnet programs; at least half the schools have waiting lists.[477]

The specific objectives of the program are to provide financial assistance to eligible LEAs for:

(1) the elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority students.
(2) the development and implementation of magnet schools projects that will assist local educational agencies in achieving systemic reforms and providing all students the opportunity to meet challenging State content standards and challenging State student performance standards;
(3) the development and design of innovative educational methods and practices; and
(4) courses of instruction within magnet schools that will substantially strengthen the knowledge of academic subjects and the grasp of tangible and marketable vocational skills of students attending such schools.[478]

The MSAP encourages its grantees, regardless of their *specific* projects, to implement activities that benefit all students in the school building where a magnet program is located, in order to promote greater interaction between students participating in magnet schools programs and their peers in the school who are not enrolled in the program.[479] In addition, grantees are encouraged to promote local capacity building and create a partnership that includes area businesses, nonprofit organizations, community services groups, and other education institutions to help ensure the continuation of magnet programs after Federal funding ends.[480] Furthermore, the recipients of the funds are also encouraged to document success of their federally funded projects, as evidence that they will use the results of MSAP support to enhance their capacity.[481]

In a grantee's first year, no more than 50 percent of funds may be used by the applicant for planning; no more than 15 percent in the second year, and 10 percent in the third year.[482]

The Improving America's Schools Act of 1994 refocuses the magnet schools program as a component of local educational reform strategies, rather than as isolated special schools.[483] DOEd is awarding competitive priority to applications that:

(1) demonstrate the greatest need for assistance, based on the expense or difficulty of effectively carrying out an approved desegregation plan and the projects for which assistance is sought;
(2) propose to carry out new magnet schools projects, or significantly revise existing magnet school project;
(3) propose to select students to attend magnet school projects by method such as lottery, rather than through academic examination;
(4) propose to implement innovative educational approaches that are consistent with the State's and local educational agency's approved systemic reform plans, if any, under Title III of the Goals 2000: Educate America Act; and,
(5) propose to draw on comprehensive community involvement plans.[484]

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[471]"Minority group" means American Indian or Alaskan Native, Asian or Pacific Islander, black (not of Hispanic origin), or Hispanic. 20 U.S.C. §§ 7201–7213.

[472]"Minority group isolation," in reference to a school, means a condition in which minority group children constitute more than 50 percent of the enrollment of the school. 20 U.S.C. §§ 7201–7213.

[473]*Hearings on Appropriations* (1995), p. 792; and DOEd, "What ESEA Does," Section on Magnet Schools, p. 1.

[474]*Catalog of Assistance*, p. 889.

[475]DOEd, "What ESEA Does," Section on Magnet Schools, p. 2.

[476]U.S. Department of Education, *The Fiscal Year 1996 Budget Summary and Background Information*, no date, p. 20.

[477]Ibid.

[478] 20 U.S.C.A. § 7202 (West Supp. 1996)

[479]DOEd, *1993–1994 Biennial Report*, pp. 132-2–132-3; and DOEd, "What ESEA Does," Section on Magnet Schools, p. 2. In addition, magnet school activities and programs that reach all pupils ensure DOEd that the school intends to contribute to State and local efforts to help all students reach high standards. *See* DOEd, "What ESEA Does," Section on Magnet Schools, p. 1.

[480]DOEd, "What ESEA Does," Section on Magnet Schools, p. 1.

[481]Ibid., p. 3.

[482]20 U.S.C.A. § 7210(b) (West Supp. 1996).

[483]U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information*, no date, p. 20.

[484] 20 U.S.C.A. § 7207 (West Supp. 1996); 34 C.F.R. § 280.32 (1995). *See also* U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information* (no date), p. 20; U.S. Department of Education, FY 1995 *Application for Grants Under the Magnet Schools Assistance Program*, no date, Section A (hereafter cited as DOEd, Magnet Schools Grant Application); and U.S. Departments of Labor, Health and Human Services,

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Up to 2 percent of the MSAP appropriated funds in any fiscal year can be used by DOEd to conduct evaluations of projects assisted under the program.[485] Each evaluation, at a minimum shall address:

- How and the extent to which magnet school programs lead to educational quality and improvement, as well as enhance student access to quality education;[486]
- The extent to which magnet school programs lead to the elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority students;[487] and
- The extent to which magnet school programs differ from other school programs in terms of the organizational characteristics and resource allocations of such magnet school programs.[488]

DOEd envisions that these changes will enable the Federal program to encourage real education innovation and reform, rather than merely support the operations of existing magnet programs.[489] The department further states that given their special curricula, magnet schools can foster attainment of the National Education Goals by helping to increase the high school graduation rate and strengthen students' knowledge of core subjects.[490] Consequently, DOEd envisions that the program can become more effective at encouraging new and innovative programs, increasing the achievement of at-risk students, and reducing minority isolation.[491]

Local education agencies that apply to the grant program must submit a desegregation plan or a modification of a plan being implemented.[492] DOEd allows applicants to submit plans that are required by: a court order, State agency or official of competent jurisdiction, Office for Civil Rights (under Title VI), or a voluntary plan.[493]

For FY 1996, $112 million has been proposed for continuation of 55 3-year awards; no new awards will be funded.[494] Each cycle, approximately 50 to 60 3-year grants are awarded.[495] No more than $4 million is permitted per award.[496] In the 1990s, the smallest and largest grants have ranged from $200,000 to the cap; and on average, awards range from $1.9 to $2 million.[497] Since 1991, each year, between $108 and $112 million is expended for the magnet schools assistance program.[498]

Congress has assessed that magnet schools are a significant part of the Nation's effort to achieve voluntary desegregation in elementary and secondary schools.[499] For instance, the number of magnet schools in the United States has more than doubled over the past decade, from under 1,000 in 1981–1982 to 2,400 by 1992.[500] More that 2,400 of the Nation's magnet schools (about 16 percent) receive Federal funds each year.[501]

Most MSAP funds are targeted primarily to large urban districts with high proportions of minority and low-income students.[502] Large urban districts enroll one-fourth of the students, but they receive over 80 percent of all MSAP funds. In addition, predominately minority districts (i.e., where more than one-half of the students are minority) enroll under one-third of the elementary and secondary students, but receive over three-quarters of MSAP funds.[503]

The enrollment in magnet schools has also increased dramatically since the enactment of the MSAP. In 1994, almost 1.4 million students, of which more than 60 percent were nonwhite, in the United States were attending magnet schools.[504] Local education agencies must continue to be creative in designing magnet schools for students at all academic levels, so that school districts do not skim off only the highest achieving students to attend the magnet schools.[505]

The Women's Educational Equity Act Program

The Women's Educational Equity[506] Act (WEEA) program was authorized in 1974[507] to promote educa-

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Education, and related Agencies, *Hearings on Appropriations before the Subcommittee on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Appropriations Committee*, 104th Cong., 1st sess. 67 (1995), p. 792.

[485]20 U.S.C. § 7212.

[486]*Id.*

[487]*Id.*

[488]*Id.*

[489]U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information*, no date, p. 20.

[490]*Hearings on Appropriations* (1995), p. 793.

[491]Ibid.

[492]*Catalog of Assistance*, p. 889.

[493]DOEd, Magnet Schools Grant Application, section B, p. 3.

[494]U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information*, no date, p. 19; *Hearings on Appropriations* (1995), p. 793.

[495]*Hearings on Appropriations* (1995), p. 272.

[496]Ibid., p. 792.

[497]Ibid.

[498]Ibid., p. 793.

[499]20 U.S.C. § 7201.

[500]DOEd, *1993–1994 Biennial Report*, p. 132-2.

[501]Ibid., p. 132-2.

[502]Ibid.

[503]Ibid.

[504]20 U.S.C. § 7201.

[505]Ibid.

[506]Educational equity for women means: (a) elimination of institutionalized barriers and inequitable educational policies and

tional equity, especially in access to and participation in academic coursework and professional careers by girls and women. Special attention is given to promoting equity for families who suffer multiple or compound discrimination based on gender and on race, ethnicity, limited English proficiency, national origin, disability, or age.[508] In addition, the WEEA program also addresses perceptions of gender roles based on cultural differences and stereotypes.[509] The program is currently administered in the School Improvement Programs.

Congress reports that despite evidence that females have made major strides in education achievement and in their ability to avail themselves of educational opportunities[510] in the past two decades, support for the WEEA program should address significant gender inequities that still exist in teaching and learning practices:

- Girls still receive significantly less attention from classroom teachers than boys; and minority females have less interaction with teachers than do other girls.[511]
- Educational materials do not sufficiently reflect experiences, achievements, or concerns of women.[512]
- Girls do not take as many mathematics and science courses as boys, and they tend to lose confidence in their mathematics and science ability as they move through adolescence. In addition, there are few women role models in the sciences; and women continue to be concentrated in low-paying, traditionally female jobs that do not require mathematics and science skills.[513]

The specific program objectives are to fund:

- *Implementation projects* that address local needs in a comprehensive systemic way. The projects assist primarily local schools' and communities' implementation of locally-defined and documented gender-equity policies and practices (practices that meet the requirements of Title IX of the Education Amendments of 1972 prohibiting gender discrimination in all education institutions receiving Federal funds).[514] These implementation projects take the form of direct services to a target group.
- *Research and development* of innovative strategies and model training programs for teachers and other school personnel, on gender equity issues.[515]

Prior to the Improving America's Schools Act, the WEEA program focused on the second objective: development of models and materials of national, statewide, or general significance. The new reauthorization will target most funds on local implementation of gender equity policies and practices. However, national research and development will also continue.[516] Specifically, allowable *implementation or demonstration project* activities include:

- Training for teachers and other school personnel to encourage gender equity in the classroom;[517]
- Activities to prevent sexual harassment;[518]
- Leadership, training, and school-to-work opportunities for females, which enable them to develop professional and marketable skills to compete in the global marketplace, improve self-esteem, and benefit from exposure to positive role models;[519] and
- Vocational training for low-income women to help them move from welfare to work.[520]

Allowable *research and development* activities include:

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practices that prevent full and fair participation by women in educational programs and in American society generally; and (b) ability of women to choose freely among benefits and opportunities in educational institutions, programs and curricula, without limitations based on gender.

[507]Pub. L. No. 93-380 (1974).

[508]*Hearings on Appropriations* (1995), p. 796. According to 20 U.S.C. § 7235, men and boys are not prohibited from participating in any programs or activities assisted with the Federal funds for the WEEA program.

[509]20 U.S.C. § 7234.

[510]*See Hearings on Appropriations* (1995), p. 797.

[511]Ibid.

[512]Ibid.

[513]Ibid. Other concerns are as follows: Pregnant and parenting teenagers are at high risk for dropping out of school, and existing dropout prevention programs do not adequately address the needs of such teenagers. *See* 20 U.S.C. § 7231. In addition, sexual harassment is a significant problem in schools, undermining their ability to provide a safe and equitable learning or workplace environment. *Hearings on Appropriations* (1995), p. 797.

[514]DOEd, *1993-1994 Biennial Report*, p. 125-2; and 20 U.S.C.A §§ 7233(b)(2)(A) and 7235(2) (West Supp. 1996).

[515]20 U.S.C.A. § 7233(b)(2)(B) (West Supp. 1996). *Hearings on Appropriations* (1995), p. 796.

[516]U.S. Department of Education, *The Fiscal Year 1996 Budget Summary and Background Information*, no date, p. 25.

[517]*Hearings on Appropriations* (1995), p. 796; and DOEd, *1993-1994 Biennial Report*, p. 125-3.

[518]DOEd, *1993-1994 Biennial Report*, p. 125-3.

[519]Ibid.; and 20 U.S.C. § 7233.

[520]*Hearings on Appropriations* (1995), p. 796. Funds can also be used for programs to increase opportunities for females to enter nontraditional fields, in a technologically demanding workplace and, in particular, to enter highly skilled, high paying careers in which women and girls have been underrepresented. *See* ibid.; 20 U.S.C. § 7233 (1988). In addition, funds can also be used for in-school programs to help pregnant and parenting teens remain in school, graduate, and prepare their children for preschool. *See* DOEd, *1993-1994 Biennial Report*, p. 125-3.

- Development of nondiscriminatory tests, curricula, textbooks, software, and other educational materials to ensure the absence of gender stereotyping and bias;[521]
- Development of policies and programs to address and prevent sexual harassment and violence to ensure that educational institutions are free from threats to safety of students and personnel;[522] and
- Design of innovative strategies and model training programs in gender equity for teachers and other school personnel.[523]

Grant funds can also be used for operation of the WEEA Publishing Center for production, maintenance, and dissemination of the materials on gender equity issues.[524] In FY 1992, the majority of sales from the center were to teachers and faculty of community and junior colleges; colleges and universities; LEAs; as well as nonprofit organizations such as employment centers, girls clubs, child-care networks, and K–12 teachers.[525] Specifically, the research, development, and program implementation activities and endeavors should contribute to the establishment of the following:

- Additional, innovative textbooks, curricula, and other materials designed to achieve equity for women and girls (particularly in mathematics and science);[526]
- Nondiscriminatory tests of aptitude and achievement and of alternative assessments that eliminate biased instruments from use;[527]
- Gender equitable teaching practices;[528]
- Innovative strategies and model training programs for teachers and other education personnel;[529]
- Technical assistance programs to assure effective implementation of gender equity programs: Guidance would address issues such as participation of girls and women in mathematics and science; as well as prevention of sexual harassment and violence, to ensure that educational institutions are free from threats to the safety of students and personnel.[530]

OESE expects that the aforementioned results of grantee endeavors overall should enable females to continue to make the strides in academic achievement and professional/career success: increase access to and participation in mathematics, science, and computer science coursework; reduce the rate at which females drop out of educational institutions, and encourage them to resume their education;[531] expand guidance and counseling programs that provide females with knowledge about careers in which they have not significantly participated;[532] and increase participation in careers that require backgrounds in math and science disciplines.[533]

The funding for the WEEA program has been very erratic. The program was funded at $6 million in 1976, and reached a high of $10 million in 1980. Between 1980 and 1992, support inconsistently increased and decreased. But, since the major plummet to $500,000 in 1992, grant support has begun to increase.[534] In 1993 and 1994, $2 million was appropriated, which doubled the following year and was also proposed for FY 1996.[535] Between 1986 and 1991, the average WEEA grant was $76,892,

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[521]20 U.S.C. §7233 (b)(2)(B)(iv), (vii), (x) (West Supp. 1996).

[522]20 U.S.C. §7233 (b)(2)(B)(iv), (West Supp. 1996). *See also Hearings on Appropriations* (1995), p. 796.

[523]20 U.S.C. §7233 (b)(2)(B)(i), (West Supp. 1996). *See also Hearings on Appropriations* (1995), p. 796. In addition, the Secretary of DOEd is encouraging applications to update materials developed through previous WEEA grants. Preference would be given to applications proposing to modify materials with a clearly defined audience or market. An example of materials that need updating are for an inservice training program entitled "Teacher Education and Mathematics: A Course to Reduce Anxiety and Sex-Role Stereotyping in Elementary Education." Materials for revision include instructors' manuals, four skills modules, five attitudinal modules, and two audio tapes. *See* U.S. Department of Education, Office of Elementary and Secondary Education, *Application for Grants Under Women's Educational Equity Act Program*, July 1995, p. D1.

[524]*DOEd Biennial Report 1993–1994*, pp. 125-2–125-3.

[525]Ibid.

[526]*Hearings on Appropriations* (1995), p. 798; and 20 U.S.C. § 7233.

[527]20 U.S.C. § 7233.

[528]DOEd *1993–1994 Biennial Report*; *Hearings on Appropriations* (1995), p. 798.

[529]20 U.S.C. §7233. *See also* DOEd *1993–1994 Biennial Report*; *Hearings on Appropriations* (1995), p. 798.

[530]20 U.S.C. §7233. The research, development, and program implementation activities should also result in increased availability of published (and ready for dissemination and replication) peer-reviewed and evaluated information (i.e., software, documents, and monographs) and other educational materials concerning education equity issues (i.e., resources, programs, teaching practices). *See Hearings on Appropriations* (1995), p. 798. Training and support (including guidance and counseling to LEAs) on using the aforementioned materials, in order for LEAs to integrate gender equity in educational policies and practices can also be provided. *See* ibid.; 20 U.S.C. § 7233.

[531]Ibid.

[532]Ibid.

[533]Ibid.; *Hearings on Appropriations* (1995), p. 798.

[534]DOEd, "Women's Educational Equity," p. V-6.

[535]DOEd *1993–1994 Biennial Report*, p. 125-1; U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information*, no date, p. 25.

ranging from a low of $67,422 in 1990 to a high of $87,586 during the previous year.[536]

Through a national competition, public agencies, private nonprofit agencies, institutions and organizations, student groups, community organizations, and individuals may apply for WEEA grants.[537] Applicants should address, where appropriate, how the proposed project promotes the attainment of one or more of the National Education Goals.[538] Applications and proposals are reviewed by a panel of experts in women's programs that represent various geographical areas, racial and ethnic groups, and levels of education.[539]

A recent WEEA grantee is the Kickapoo National School in Powhatan, Kansas, that serves 130 K–12 American Indian students bused in from five counties belonging to four reservations and representing 29 different tribes.[540] The $288,000 4-year grant will be used for a job-shadowing program and technological, hands-on training at the Kickapoo tribal offices, since there is little industry in northeast Kansas, a rural low socioeconomic community.[541]

Congress has approved $2 million for the WEEA program in fiscal year 1997,[542] however, this figure is insufficient to cover the costs of full funding for all WEEA continuation grants. The projects would need to seek alternate funding sources in order not to lose their knowledge base. Current grantees and educators interested in significantly increasing school-to-work opportunities for minorities, women, and individuals with disabilities claim that if WEEA loses its authorization, then opportunities for these students to prepare for careers that are not traditional for their race, gender, or disability will diminish.[543]

Conclusion

The program offices described above are responsible for the federally assisted programs that shape the Nation's elementary and secondary schools. These offices are obligated to distribute funds and operate programs responsibly so as to prevent recipients from using Federal money in a discriminatory manner. Although the Office for Civil Rights, discussed below, is primarily responsible for ensuring nondiscrimination in federally assisted programs, the program offices have the authority and the financial resources to promote equal educational opportunity for all students in elementary and secondary education programs. Moreover, the Federal programs operated by DOEd's program offices are the means through which Federal civil rights laws are enforced to protect all students from discrimination.

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[536]U.S. General Accounting Office/Program Evaluation and Methodology Division, "Women's Educational Equity Act: A Review of Program Goals and Strategies Needed," December 1994, p. 11.

[537]*Catalog of Assistance*, p. 857.

[538]20 U.S.C. § 7234.

[539]*Catalog of Assistance*, p. 857. Final decisions on grants are made by DOEd on the basis of the selection criteria published in the regulations and statutory considerations, and to the extent feasible, on the basis of geographic distributions. Special consideration is given to applications submitted by organizations or individuals who have not received assistance under this program. See ibid.

[540]"Kickapoo Tribe Uses Gender Equity Grant to Open Career Opportunities: School Searches for Ways to Break Unemployment Cycle," *Educating for Employment*, March 1996, pp. 1 and 5.

[541]Ibid., p. 1.

[542]U.S. Department of Education, "Fiscal Year 1997 Congressional Action," (OCRE files), p. 4.

[543]Ibid.

Chapter 4

National Education Trends: A Statistical Summary

Overview

Although more than four decades have passed since the *Brown* decision,[1] OCR continues to find that many students face various barriers and inequities that can prevent them from having an equal opportunity to access all educational facilities and resources, participate in all school programs (e.g., subjects, extracurricular activities), maximize their learning potential, enhance their career opportunities, and attain an overall high-quality education. Analyses of educational data, such as student-to-teacher ratios, school enrollment, grade retention and promotion, and attainment of a high school diploma or bachelor's degree offer some evidence of the levels of student achievement.[2]

This chapter summarizes data on educational attainment and achievement by race, ethnicity, and gender over time. Although problems of student achievement may result from many causes, such data can be informative but do not alone measure the extent to which the Nation is moving towards its goal of equal educational opportunity for all individuals, regardless of racial/ethnic background or gender. Measures of educational attainment include rates for middle and high school dropouts, high school completion, enrollment in postsecondary education, completion of at least some college education, and college and university graduation (at the bachelor's degree level). Trends are examined for (a) the Nation as a whole, (b) various historically underrepresented racial/ethnic minority groups[3] relative to their white peers, (c) females relative to males, and (d) students with disabilities and limited English proficiency. The report focuses on these groups because they are the students whose educational inequality led to passage of the civil rights laws enforced by OCR.

In addition to tracking trends in educational achievement, the chapter provides data related to the four issue areas that are the focus of this series of Commission reports. Data on the extent of ability grouping and tracking and the numbers and characteristics of students with disabilities and students with limited English proficiency serve to highlight the dimensions of the problems addressed in the Commission's reports.

Overall Uses of National Trend Data

National trend data reflect the status and progress of education in the United States for students in general and in some cases, for racial/ethnic, gender, and other subpopulations. Data on educational inputs, outputs, measures of educational achievement, and indicators of educational attainment relating to the Nation's students, schools, and teachers are published in a variety of sources by educational researchers, policymakers, and government agencies, particularly the Office of Educational Research and Improvement (OERI), the research arm of the U.S. Department of Education (DOEd). Policymakers in State and local education agencies, school administrators, and teachers, guidance counselors, school psychologists, and other school personnel all rely on complete and accurate data to

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[1] 347 U.S. 483 (1954).

[2] U.S. Department of Education, *The Condition of Education 1995*, by Thomas Smith et al. (Washington, D.C.: Government Printing Office, June 1995), p. iii (hereafter cited as DOEd, *Education 1995*). Much of the information on these elements is provided by the Office of Educational Research and Improvement (OERI), in the U.S. Department of Education. OERI has responsibilities as the lead educational research and development agency to foster educational quality and equal opportunity and is the sole Federal agency for educational research that spans all grade levels and content areas of instruction. *See* Richard Atkinson and Greg Jackson, eds., *Research and Reform: Roles for the Office of Educational Research and Improvement* (Washington, D.C.: National Academy Press, 1992), pp. 59–60. In its role as the lead educational research and development agency (concerned about all grade levels and content areas of instruction), OERI provides guidance to its data users so that they are able to derive appropriate interpretations and avoid erroneous conclusions. For instance, with respect to the SAT, OERI cautions researchers that information such as students' class rank was self-reported. *See* U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics 1995*, by Thomas Snyder (Washington, D.C.: Government Printing Office, October 1995), p. 129 (hereafter cited as DOEd, *Digest 1995*). In addition, OERI informs its data users that in some years, due to imputation techniques, data on fall enrollment in postsecondary institutions may not be consistent between years. *See* DOEd, *Digest 1995*, p. 176.

[3] Due to data availability, most trends will focus on blacks and Hispanics as major demographic subpopulations.

make decisions that affect students' access to and participation in a quality education.

Uses of Data on Education Inputs

Data on educational inputs, in particular, help to assess the Nation's success at providing some of the ingredients for structuring quality nondiscriminatory programs and for advancing equal educational opportunity for all students. Students' access to and participation in specific educational opportunities are affected and enhanced by their instructors; facilities, such as school buildings and classroom sizes; as well as resources (such as computers and textbooks). Examination of data on these inputs enables policymakers to identify where potential inequities in various national education programs occur. For instance, experts in the field of special education can determine if trends in student-teacher ratios in classes for students with disabilities reveal a shortage of teachers.[4] In addition, data on educational inputs can be used by State and/or local education agencies to determine how their provision and allocation of resources for certain programs compares to a national average. Furthermore, at the school district level, officials can use their input data to determine which programs have a disproportionate share of resources or are underserved. The data on inputs can assist local educational agencies to address potential disparities in educational opportunities.

Uses of Data on Education Placement Settings

Education policymakers use trend data to propose guidelines on instructional methods and placement settings. With respect to students with disabilities, data reveal numbers and percentages of students with learning disabilities, educable mental retardation, serious emotional disturbance, and other disabilities who are educated in the regular classroom, resource room, separate classroom, and other more restrictive environments. For instance, from the late 1980s through the 1990s, the national data reveal that there has been a movement of students classified as mentally retarded to less restrictive environments, reflected in fewer placements in separate classes in 1992–1993 than in 1989–1990 and more placements in the resource room in 1992–1993 compared to 1989–1990. National trend data also are available on percentages of schools that offer English as a Second Language and bilingual education programs, which aim to address the language education needs of students with limited English proficiency.

Uses of Data on Measures of Educational Achievement

Education policymakers can rely on data on measures of educational achievement, such as standardized test scores, including the National Assessment of Educational Progress (NAEP). These data reveal how well the Nation's students, overall, are performing over time. For instance, between the 1970s and 1990s, the average math and science proficiency scores increased at the 4th, 8th, and 12th grades. In contrast, reading and writing scores have been somewhat more stable.

Data on nondiscriminatory and unbiased proficiency assessments of students' progress in core subjects can be used to assist education decisionmakers, especially at the local level, in placing students in educational programs; grouping students to reflect differential mastery in various subjects; reevaluating and regrouping students as needed to reflect changes in ability, proficiency, and performance levels in subjects; and classroom or grade level modifications of curriculum to meet individual student needs.

Data reported on subpopulations (e.g., racial/ethnic, gender, disability status) are useful for policymakers and researchers to identify possible disparities in performance that can reflect inequities within schools, overall and in specific education programs and opportunities. Thus, NAEP data between the 1970s and 1990s reveal discrepancies in performance among ethnic minorities and whites, as well as between females and males. For instance, in the 1970s through the 1990s, at all grade levels, females scored higher than males on reading and writing proficiencies.[5] In contrast, males consistently (at all grade levels) scored higher than their female peers with respect to science.[6]

In addition, NAEP data reveal that in some respects, gaps between whites and ethnic minorities have narrowed over time. For instance, in 1975 average reading proficiency scores of 17-year-old Hispanics was 40 points below that of their white peers and 10 points below that of white 13-year-olds; by 1992 the proficiency gap was smaller (26 points between Hispanics and their white peers), and Hispanic 17-year-olds performed about the same as white 13-year-olds.[7]

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[4]Experts in the field of special education may determine that a shortage of special education teachers is occurring, based on their judgment of "high" student-teacher ratios. Lack of appropriate attention given to students due to a high student-teacher ratio could be a barrier to equal educational opportunity within a school or within a specific education program.

[5]*See* tables 4.25 and 4.26.

[6]*See* table 4.28.

[7]*See* table 4.25.

Although other performance gaps have narrowed as well, significant disparities remain in all four core subjects between whites and minorities.[8] Although statistical differences in no way definitively indicate discrimination, they may require analyses by decisionmakers to make sure discrimination is not part of their creation. Consequently, education researchers and policymakers can be alerted to some potential discriminating barriers (which need to be investigated) to equal educational opportunity within schools or in education programs. Therefore, the trend data on achievement measures, presented by subpopulation, can warn policymakers of potential inequities and enable them to monitor proactively the education offered to all students, in order to promote equal educational opportunity.

State and local policymakers can use national trend data on measures of achievement to compare their respective entities' performances on standardized test scores, for instance, to that of the Nation as a whole. The same analysis can be done at the subpopulation level. For instance, a locality can track and monitor the performance of ethnic minorities (at the elementary and secondary levels) on national assessments in core subjects. Within any given year, or over a period of time, the school district data can be compared to national average scores on the same proficiency tests with respect to the same racial/ethnic subpopulations.

Uses of Data on Indicators of Educational Attainment

Education policymakers can also examine data on measures of educational attainment (ranging from high school dropout rates, high school completion rates, college enrollment rates, completion rates of at least 1 year of postsecondary education, to undergraduate degree attainment). These data reveal how well the Nation's students, overall, are performing over time. In addition, the information allows for comparison of trends in the Nation's students' educational attainment with that of other nations.

With respect to high school completion rates, policymakers and other members of the education community can examine the data that show an increase in percentage of students who persist in school through the end of 12th grade. For instance, between 1971 and 1994, the percentage of the Nation's 25- to 29-year-olds who were high school graduates increased from 78 to 86 percent.[9] In addition, the data reveal that the percentage of high school students who withdraw before graduation is declining, despite curricular changes (attributed to rising standards and more compulsory classes) that can make school more challenging or difficult. In 1970, for instance, 15 percent of youths between the ages of 16 and 24 without high school diplomas were not enrolled in school, and by 1993 this rate had fallen to 11 percent.

Education policymakers interested in students with disabilities can examine time series data on students with a specific disability relative to their peers with other disabilities and monitor (over a period of time) their basis for exiting special education programs. For example, if an education researcher is comparing the experiences of students with serious emotional disturbance (SED) relative to their peers with other disabilities, the data reveal that between the late 1980s and early 1990s, graduation with a diploma was the most common basis of exit for *all* disability groups *except* students with SED. In addition, although the dropout rate among students with SED is the highest among any group of students with disabilities, the data convey to researchers that this rate has fallen from 43 percent (in 1989–1990) to 35 percent (in 1991–1992).[10]

The education policymaker focusing on students with disabilities can also, within any given year, compare the criteria for exiting among students with various types of disabilities. The data will consistently show that, in any school year, the percentage of students exiting through each basis varies considerably from one disability group to another. In 1991–1992, for instance, almost 50 percent of students with specific learning disabilities graduated with a diploma, compared to 28 percent of their peers with serious emotional disturbance.[11]

Data reported on subpopulations (such as various racial/ethnic groups) with respect to measures of attainment, such as high school completion rates, enable policymakers and researchers to identify possible disparities that can reflect inequities in education programs and opportunities. For instance, the data from DOEd reveal that in 1971, 18 percent of white 25- to 29-year-olds compared to 41 percent and 52 percent of their respective black and Hispanic peers achieved less than a high school diploma.[12] Resulting white-ethnic minority attainment gaps were 23 and 34 percentage points between whites and blacks, and between whites and Hispanics, respectively. By 1994 the gaps were

[8] *See* tables 4.25, 4.26, 4.27, and 4.28.
[9] *See* table 4.1.
[10] *See* table 4.12.
[11] *See* table 4.12.
[12] *See* table 4.1.

TABLE 4.1
Percentage of 25- to 29-Year-Olds Who Have Attained Various Levels of Education, by Race/Ethnicity and Gender[1]

	All			Whites			Blacks			Hispanics		
	Total	Males	Females	Total	Males	Females	Total	Males	Females	Total	Males	Females
1971												
Achieved less than high school diploma	22.3	20.9	23.5	18.3	17.0	19.5	41.2	53.3	39.5	51.7	48.7	54.3
Completed high school	77.7	79.1	76.5	81.7	83.0	80.5	58.8	56.7	60.5	48.3	51.3	45.7
Completed 1 + years of college[2]	43.6	48.7	38.4	44.9	50.2	39.5	30.9	29.0	32.2	30.6	38.3	22.8
Completed 4 + years of college[2]	22.0	25.8	18.1	23.1	27.0	19.1	11.5	12.1	10.9	10.5	15.4	5.8
1981												
Achieved less than high school diploma	13.7	13.5	13.9	10.2	10.3	10.1	22.4	21.2	23.4	40.2	40.9	39.6
Completed high school	86.3	86.5	86.1	89.8	89.7	89.9	77.6	78.8	76.6	59.8	59.1	60.4
Completed 1 + years of college[2]	50.1	52.7	47.5	51.2	54.1	48.3	42.5	43.0	42.2	39.6	41.7	37.7
Completed 4 + years of college[2]	24.7	26.6	22.8	26.3	28.4	24.2	14.9	15.4	14.5	12.5	14.4	10.9
1994												
Achieved less than high school diploma[3]	13.9	15.5	22.4	8.9	10.0	7.7	15.9	17.2	14.7	39.7	42.0	37.0
Completed high school	86.1	84.5	87.6	91.1	90.0	92.3	84.1	82.8	85.3	60.3	58.0	63.0
Completed 1 + years of college[2]	62.2	60.6	63.9	64.6	62.6	66.7	52.0	51.2	52.5	50.3	48.0	52.7
Complete 4 + years of college[2]	28.4	28.4	28.5	31.2	30.9	31.4	17.8	19.7	16.1	15.5	14.0	17.1

Source: U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1996,* by Thomas Smith et al. (Washington, D.C.: Government Printing Office, June 1996), p. 92 and supplemental tables provided by NCES.

[1] Data presented in this table were not available for students who are members of other races and ethnicities, such as Asian Americans and Native Americans.

[2] "Completed 1 + Years of College" and "Completed 4 + Years of College" are percentages of high school graduates only.

[3] As of 1988, the Current Population Survey asks respondents whether they have passed a general high school equivalency examination (such as the GED). Those who have responded "yes" are considered as high school graduates. Prior to that year, it was possible that a person who attended 10th grade, dropped out without completing it, subsequently passed the GED examination, and ultimately received a high school equivalency credential would not have been classified as a high school completer (and would instead have been classified as having "less than a high school diploma.") As of 1988, adults with "less than high school diploma" no longer includes those who have passed an equivalency examination. *See* DOEd, *Education 1995*, p. 247.

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reduced to 7 percentage points for blacks, but the white-Hispanic gap remained basically unchanged.[13]

Overall, with respect to measures of educational attainment (from the 1970s to the 1990s), the data show that the disparities in high school dropout rates between white 25-to 29-year-olds and their minority peers are still evident, although they have narrowed. The reverse has occurred with respect to completion rates of at least 4 years of college, as the gaps between whites' and blacks in this age group narrowed considerably between 1971 and 1995, the Hispanic-white gaps did not close during the same time period. White-minority gaps in college completion among 25- to 29-year-olds did not close between 1971 and 1994 for either blacks or Hispanics.[14]

Trend data that reveal significant differences in educational attainment among ethnic minorities offer a sign to education researchers and policymakers and alert them to some inequities or potentially discriminating barriers to equal educational opportunity within schools, education programs, or education processes (e.g., college admissions or enrollment process) that have not been eliminated or reduced and, therefore, need to be investigated. As a result, education programs, educators, resources, policies, and procedures in schools should be examined, and steps should be taken to ensure that these elements are not limiting students' educational opportunities or resulting in discrimination.

State and local policymakers can use national trend data on measures of attainment (ranging from high school completion to college graduation rates) to compare their respective entities' performance to that of the Nation as a whole. The same analysis can be done for subpopulations. For instance, localities can monitor and track the high school dropout rates of their Hispanic students and use longitudinal data on attainment measures to determine if these rates are above, below, or the same as the national average (in any given year or over a period of time).

General Education Trends

Students

During the 1995–1996 school year, 44.6 million students attended public elementary and secondary schools in United States,[15] up from 44.1 million the previous year.[16] Enrollment varied by State, ranging from fewer than 100,000 in Wyoming to more than 5 million students in California.[17] As of 1993–1994, the most recent year for which data are available, 71 percent of public school students were in grades pre-K–8, 27 percent were in grades 9–12, and 2 percent were in ungraded classes.[18] Although the number of students graduating from public high schools remained relatively constant at roughly 2.2 million between 1990 and 1994, the number increased to slightly more than 2.3 million students predicted to graduate from the Nation's public high schools in 1996.[19]

The percentage of students from racial and ethnic minority groups has increased over the past two decades. Minorities were almost 34 percent of all students in 1993–1994,[20] up from 24 percent in 1976.[21] In 1993–1994, 66.1 percent of students in the United States were white, 16.6 percent were black, 12.7 percent were Hispanic, 3.6 percent were Asian/Pacific Islander, and 1.1 percent were Native American.[22] In 1976, 76.0 percent of students were white, 15.5 percent were black, 6.4 percent were Hispanic, and 2.0 percent were Asian/Pacific Islanders and Native Americans.[23] The percentage of students who are minorities varies widely across States. In the 1993–1994 school year, 96 percent of public school students in the District of Columbia were nonwhite minorities, compared to over 50 percent

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[13] *See* table 4.1.

[14] DOEd, *Condition of Education*, p. 92; DOEd, *Progress of Blacks*, pp. 15-16; and DOEd, *Progress of Hispanics*, p. 17; table 4.1.

[15] U.S. Department of Education, National Center for Education Statistics, *March 1996 Common Core Data*, table 1 (hereafter cited as DOEd, *Common Core Data*).

[16] U.S. Department of Education, Office of Educational Research and Improvement, *Public School Student, Staff, and Graduate Counts by State, School Year 1994–95*, by Jonaki Bose (Washington, D.C.: May 1996), p. 1 (hereafter cited as DOEd, *School Year 1994–95*).

[17] DOEd, *Common Core Data*, table 1.

[18] DOEd, *School Year 1994–1995*, table 1. (Most recent data on school enrollment by level.)

[19] DOEd, *Common Core Data*, table 3, and U.S. Department of Education, *Early Estimates: Public Elementary and Secondary Education Statistics: School Year 1993–94*, January 1994, table 3 (hereafter cited as DOEd, *Early Estimates*).

[20] DOEd, *Digest 1995*, table 44, p. 60. (Most recent data on racial/ethnic distribution of students.) Unless otherwise mentioned, "white" refers to non-Hispanic whites and "black" refers to non-Hispanic blacks.

[21] U.S. Department of Education, *The Condition of Education 1994*, by Thomas Smith (Washington, D.C.: Government Printing Office, August 1994), p. 299 (hereafter cited as DOEd, *Education 1994*).

[22] DOEd, *Digest 1995*, table 44, p. 60.

[23] DOEd, *Education 1994*, p. 299.

in California, Mississippi, and Texas, and less than 10 percent in Idaho, Minnesota, and Maine.[24]

School Districts

School districts range in size.[25] Only 22 of the Nation's 14,523 school districts enroll more than 100,000 students, while more than 1,800 report having fewer than 150 students.[26] Although only 1.5 percent of districts serve 25,000 or more students, almost one-third of U.S. public school students receive their education in these districts.[27]

Teachers

The number of teachers in the Nation's public schools has increased during the 1990s. In 1990 the Nation had 2.4 million public school teachers;[28] by 1993, the number had grown to 2.5 million; and in 1995–1996, about 2.6 million teachers provided instruction in public K–12 schools.[29] In 1994–1995, 54 percent of teachers served pre-K–6th graders, 35 percent instructed secondary students, and the remaining 11 percent taught pupils in ungraded classes.[30]

In 1993–1994, overall, 12.8 percent of teachers and 13.8 percent of principals were members of a racial/ethnic minority group.[31] In 1990, for the U.S. overall, 14 percent of teachers and principals were members of an ethnic minority group,[32] and States had varying disparities between the percentages of students and teachers who were nonwhite.[33] For instance, the District of Columbia and Hawaii had high percentages of both minority students and teachers, with disparities of less than 10 percent.[34] West Virginia, Maine, and Vermont had low percentages of both minority teachers and students.[35] Several States, including California and New Mexico, had minority student enrollment exceeding 50 percent, yet fewer than 30 percent of their teachers were from ethnic minority subpopulations.[36] According to the Department of Education, exposure to minority teachers is considered desirable for minority and nonminority students; yet, as of 1993–1994, 42 percent of public schools had no minority teachers at all.[37]

School Enrollment, Student-Teacher Ratios, and Class Sizes

School Size

Average school size varies according to whether schools are in central cities, suburban areas, or rural areas and small towns. On average, central city schools are larger than suburban schools, which, in turn, are larger than schools in rural areas and small towns.[38] In 1993–1994, the average public elementary and secondary schools in the central city had student enrollments of 547 and 1,083, respectively.[39] Average enrollments in suburban elementary and secondary schools were 524 and 973 students, respectively;[40] and average enrollments in rural areas and small towns[41] were 378 and 468 pupils, respectively.[42]

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[24]DOEd, *Digest 1995*, table 44, p. 60.

[25]U.S. Department of Education, Office of Research and Improvement, *Statistics in Brief: Overview of Public Elementary and Secondary Schools and Districts: School Year 1993–94*, by Lee Hoffman (Washington, D.C.: September 1995), p. 1 (hereafter cited as DOEd, *Overview*). (Most recent data on school districts.)

[26]Ibid., table 5.

[27]Ibid., p. 2.

[28]DOEd, *Early Estimates*, table 2.

[29]DOEd, *Common Core Data*, table 2.

[30]DOEd, *School Year 1994–95*, table 2. (Most recent data on distribution of teachers by grade level.)

[31]U.S. Department of Education, National Center for Education Statistics, *Schools and Staffing In the United States: Statistical Profile, 1993–1994*, by Robin Henke et al. (Washington, D.C.: Government Printing Office, 1996), tables 3.4 and 3.5 (hereafter cited as DOEd, *1993-1994 Statistical Profile*). (Most recent *national* data on racial/ethnic background of school staff.)

[32]U.S. Department of Education, National Center for Education Statistics, *1990–1991 Schools and Staffing Survey: Selected State Results*, by Stephen Broughman et al. (Washington, D.C.: Government Printing Office, 1994), tables 1.3 and 1.7, and figures 1.3, 1.7, 2.1A, and 2.1C (hereafter cited as DOEd, *Schools and Staffing Survey*).

[33]Ibid., table 1.7 and figure 1.7. (Most recent *State* level data on racial/ethnic background of school staff.)

[34]Ibid., table 1.7 and figure 1.7.

[35]Ibid., table 1.7 and figure 1.7.

[36]Ibid., table 1.7 and figure 1.7.

[37]DOEd, *1993–1994 Statistical Profile*, p. 5.

[38]The general concept of a metropolitan area is one of a core area containing a large population nucleus, together with adjacent communities that have a high degree of social and economic integration with that core. MSAs are defined by the Office of Management and Budget as a standard for Federal agencies in the preparation and publication of statistics relating to metropolitan areas. *See* U.S. Department of Commerce, Bureau of Census, *The American Almanac: Statistical Abstract of the United States* (Austin, TX: The Reference Press, 1994), p. 4.

[39]DOEd, *1993–1994 Statistical Profile*, table 2.2. (Most recent data on average school size.)

[40]DOEd, *1993–1994 Statistical Profile*, table 2.2.

[41]"Central city schools" are any schools in a jurisdiction in which three-fourths is a central city of an Metropolitan Statistical Area (MSA). "Urban fringe/large town" schools are any schools in a county constituting an MSA and three-fourths surrounds a central city. "Rural/small town" schools are schools in an area that is three-fourths outside an MSA. *See* U.S. Department of Education, *The Condition of Education 1995*, by Thomas Smith

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School enrollment also varies by State. In 1990–1991, average student enrollment at elementary schools ranged from fewer than 150 in Nebraska to more than 650 in Florida, while the Nation averaged 427.[43] Enrollment in the Nation's public high schools ranged from fewer than 200 in North Dakota and Alaska, to more than 1,000 in Arizona, while the national average was 668.[44]

Student-Teacher Ratios and Class Sizes

According to the Department of Education, student-teacher ratios[45] have an important effect on teachers' workloads and thus on the amount of individualized attention they can give to their students.[46] During the 1990s, student-teacher ratios increased slightly. In fall 1995–1996, the national average student-teacher ratio was 17.3,[47] up from 16.7 in 1990–1991.[48] Student-teacher ratios vary from State to State. In 1994–1995, student-teacher ratios ranged from a low of 13.2 students per teacher in the District of Columbia to a high of 24.3 in Utah, with a national median of 16.[49] In 1990–1991, student-teacher ratios ranged from 13.9 in the District of Columbia to 23.2 in California and Utah.[50]

In 1993–1994, the average K–6 class had 25.2 students.[51] Average class size ranged from 20.4 in Vermont to 30.1 in California.[52] In 1990 the average K–6 class was somewhat smaller, with 24 students, ranging from 19 in Vermont to 29 in California.[53]

Educational Achievement of Students

Over the past few decades, overall graduation rates of American students have increased. High school dropout rates have declined, and the percentages of young Americans who have completed high school, who have attended college, and who graduate from college have increased. The percentage of adults between the ages of 25 and 29 who withdrew from high school before attaining a diploma or equivalent[54] decreased from 22 percent in 1971 to 13 percent in 1995.[55] Most of this decrease occurred before 1981. Since 1981, high school completion rates for 25- to 29-year-olds have stabilized at around 86 percent.[56] Although the high school completion rate for the Nation has stabilized, college attendance rates and completion rates have continued to increase.[57] Between 1971 and 1994, the percentage of 25- to 29-year-old high school graduates who had completed at least some college education[58] rose 17 percentage points from 44 percent in 1971 to 61 percent in 1994.[59] In 1994, 27 percent of 25- to 29-year-old high school graduates had completed at least 4 years of postsecondary education, up from 22 percent in 1971.[60]

Females, in particular, have made significant gains in educational attainment and now have higher high school completion rates, college attendance rates, and college graduation rates than males. Conversely, male

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et al. (Washington, D.C.: Government Printing Office, June 1995), p. 497.

[42]DOEd, *1993–1994 Statistical Profile*, table 2.2.

[43]DOEd, *Schools and Staffing Survey*, table 1.5 and figure 1.5A. (Most recent data on *State* average elementary school size.)

[44]Ibid., table 1.5 and figure 1.5B. (Most recent data on *State* average high school size.)

[45]A student-teacher ratio is computed as the number of full-time students divided by the number of full-time equivalent teachers in the Nation (or State). See DOEd, *Schools and Staffing Survey*, p. 16. Ratios should not be interpreted as average class size, since not all teachers are assigned to a class (for example, music and reading teachers in elementary schools.) *See* U.S. Department of Education, Office of Educational Research and Improvement, *Public School Student, Staff, and Graduate Counts by State, School Year 1994–95*, by Jonaki Bose (Washington, D.C.: May 1996), p. 2 (hereafter cited as DOEd, *School Year 1994–95*).

[46]DOEd, *1993–1994 Statistical Profile*, p. 3.

[47]U.S. Department of Education, National Center for Education Statistics, *(forthcoming) Digest of Education Statistics 1996*, by Thomas Snyder (Washington, D.C.: Government Printing Office, October 1996), tables 39 and 64 (hereafter cited as DOEd, *Digest 1996*). The figure was computed by dividing the total fall 1995 public school student population (44.6 million) by the number of teachers (2.586 million).

[48]DOEd, *Schools and Staffing Survey*, table 1.6.

[49]DOEd, *School Year 1994–1995*, pp. 1–2. (Most recent year for *State*-level student-teacher ratios.)

[50]DOEd, *Schools and Staffing Survey*, table 1.6.

[51]DOEd, *1993–1994 Statistical Profile*, table A–15. (Most recent data on *national* average class sizes.)

[52]Ibid., table A–15. (Most recent data on *State* average class sizes.)

[53]DOEd, *Schools and Staffing Survey*, table 4.1.

[54]As of 1988, the Current Population Survey asks respondents whether they have passed a general high school equivalency examination (such as the GED). Those who have responded "yes" are considered as high school graduates. Prior to that year, a recipient of a general equivalency credential was considered as completing less than a high school education. *See* DOEd, *Education 1995*, p. 247.

[55]*See* table 4.1.

[56]DOEd, *Education 1995*, p. 72. *See* table 4.1.

[57]*See* table 4.1.

[58]Recipients of "some college" are those who attended a first year of college but did not complete it, and those who have completed 1 to 3 years of college. *See* DOEd, *Education 1995*, p. 248.

[59]DOEd, *Education 1995*, p. 245. *See* table 4.1.

[60]DOEd, *Education 1995*, p. 72. *See* table 4.1.

educational attainment is not keeping pace. Whereas in the early 1970s, a smaller percentage of women (76.5 percent) between the ages of 25 and 29 had graduated from high school than of men (79.1 percent), by 1995, 25- to 29-year-old women's high school completion rates (87.4 percent) were basically the same as those of their male peers (86.3 percent). In the early 1970s, among high school graduates between the ages of 25 and 29, a smaller percentage of females (about 40 percent) than of males (about 50 percent) had completed at least 1 year of college.[61] By 1994 the reverse was true: 62 percent of female and 59 percent of male high school graduates between the ages of 25 and 29 had completed at least 1 year of college.[62] Although the percentage of all women who have bachelor's degrees remains below that for men, the reverse is true among the young. In 1995, 26 percent of all males and 20 percent of females over age 25 had bachelor's degrees.[63] Among those between the ages of 25 and 29, the percentage of women who had bachelor's degrees was 24.9 percent, slightly above the percentage for men, which was 24.5 percent.[64] Data on the number of degrees conferred also demonstrate the educational progress of women relative to men.[65] In the 1970s, more associate's, bachelor's, and master's degrees were awarded to men than to women; and women were 43 percent of degree recipients in 1973. By 1981 women[66] earned more than half of all bachelor's degrees conferred.[67]

Blacks and Hispanics[68] have also made substantial gains in educational attainment and have partially closed the gap between their educational attainment and that of whites. Nevertheless, blacks and Hispanics continue to drop out of school at higher rates, and graduate from high school, enroll in college, and graduate from college at lower rates than their white counterparts.

In 1971, among 25- to 29-year-olds, more than half of Hispanics and 41 percent of blacks, compared to 18 percent of their white peers, had neither received a high school diploma nor passed an equivalency examination (such as a GED). Thus, in that year, the percentage of black young adults who had not graduated from secondary school was more than twice that of their white peers, and the percentage of Hispanics who had not graduated was almost three times that of their white peers.[69] However, in the past two decades, the percentage of ethnic minorities withdrawing from high school before completion has declined.[70] By 1995 the percentages of black and Hispanic 25- to 29-year-olds who were high school graduates had increased considerably relative to their percentages in 1972—from 59 percent to 84 percent for blacks and from 48 percent to 60 percent for Hispanics. Gaps between the high school completion rates of 25- to 29-year-old whites and blacks had narrowed during the period between 1971 and 1995, but the gaps in high school completion rates between 25- to 29-year-old whites and Hispanics did not narrow appreciably.[71]

As a greater percentage of minorities have completed high school, the proportion attaining additional levels of education and entering college to pursue an undergraduate degree also has increased.[72] For instance, the percentages of 25- to 29-year-old black and Hispanic high school graduates who had completed at least some postsecondary education increased from less than one-third in 1971 to about one-half in 1994.[73] However, the gaps between the percentages of white and black high school graduates who had completed some college remained basically unchanged.[74] Similarly, the white-minority gaps in college completion rates did not diminish in the past two decades.[75] Despite the increases in the percentages

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[61]DOEd, *Education 1995*, p. 245.

[62]Ibid., p. 15. *See* table 4.1.

[63]Current Population Survey, March 1995 prepublication data, table 1 (hereafter cited as CPS, March 1995). Additional information on the "over age 25" population includes, as examples:

- "The distribution of the population by highest level of education attained (e.g., less than 9th grade, 9th to 12th grade, high school graduate, some college, bachelor's degree, etc.)," by State; and
- "Percent of population with high school diploma or higher and percent of population with bachelor's degree or higher," by State and race/ethnicity.

See DOEd, *Digest 1995*, pp. 20–21.

[64]CPS, March 1995.

[65]DOEd, *Education 1995*, p. 15.

[66]Data do not state age ranges or previous education attained (e.g., high school graduate, associate degree recipient) of the women who earned these degrees. *See* U.S. Department of Education, *Digest of Education Statistics 1994*, by Thomas Snyder (Washington, D.C.: Government Printing Office, October 1994), p. 245 (hereafter cited as DOEd, *Digest 1994*).

[67]Ibid.

[68]Due to limited data availability, Hispanics are treated as if they are a homogeneous group.

[69]*See* table 4.1.

[70]*See* table 4.1.

[71]*See* table 4.1.

[72]*See* table 4.1.

[73]*See* table 4.1.

[74]*See* table 4.1.

[75]*See* table 4.1.

of black (from 12 to 16 percent) and Hispanic (11 to 13 percent) high school graduates between the ages of 25 and 29 who had completed at least 4 years of college, the white-minority gaps persisted, as white 25-to-29-year-old high school graduates' college completion rates rose from 23 to 31 percent.[76]

Educational Attainment: High School Completion and Dropouts

High School Completion

Over the past two decades, the high school completion rates[77] of young adults have remained relatively stable, ranging between 80 and 82 percent for 18- to 24-year-olds. However, this stability masks differing trends for whites, blacks, and Hispanics, and for men and women.

Race/Ethnicity Analysis.[78] Between 1973 and 1994, the high school completion rates of whites between the ages of 18 and 24 changed very little, ranging between 82 and 84 percent.[79] Their black and Hispanic counterparts' high school completion rates increased, but, despite these increases, they continue to lag behind that of their white peers. For blacks, the percentage of 18- to 24-year-olds who had completed high school rose steadily throughout the two decades, increasing from 67 percent to 77 percent.[80] Hispanics experienced greater fluctuations in their secondary school completion rates.

In 1973 the high school completion rate of black 18- to 24-year-olds (67 percent) was 16 percentage points below that of their white peers (83 percent).[81] The gap was cut in half over the next two decades. By 1994 the high school completion rate of black 18- to 24-year-olds (77 percent) was only 6 percentage points below that of their white counterparts.[82] In 1985 the high school completion rate of blacks over age 25 (60 percent) was considerably lower than that of their white peers (76 percent).[83] However, between 1985 and 1995, the rate increased more for black adults over age 25 than for their white peers.[84] By 1995, 74 percent of blacks over age 25 compared to 86 percent of their white peers were high school graduates.[85] As a result, the gap between high school completion rates for whites and blacks over age 25 narrowed 4 percentage points, from 16 percent in 1985 to 12 percent in 1995. Throughout the 1970s, Hispanic 18- to 24-year-olds' high school completion rates tended to hold at around 55 percent.[86] In the early

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[76] *See* table 4.1.

[77] Completers of high school are those who earned either a high school diploma or an equivalency degree, such as the General Educational Development (GED) certificate. *See* Deborah Carter and Reginald Wilson, *Minorities in Higher Education* (Washington, D.C.: American Council on Education, June 1995), p. 8 (hereafter cited as ACE, *Minorities*).

[78] Data are currently lacking on Asian Americans and Native Americans in certain measures of achievement and indicators of attainment, such as high school completion rates, high school dropout rates, college enrollment rates, and college completion rates. The U.S. Commission on Civil Rights reported a similar finding in the 1990s about Asian Americans. The Commission was concerned that available sample sizes of Asian Americans (and other ethnic minorities such as Native Americans) are too small to provide information about them. *See* U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s* (Washington, D.C.: February 1992), p. 205.

[79] *See* table 4.2.

[80] *See* table 4.2.

[81] ACE, *Minorities*, table 1. *See* table 4.2.

[82] ACE, *Minorities*, table 1, and Peter West, "Minority College Enrollment Up 5 Percent in 1994," *Education Week*, vol. xv, no. 39 (June 19, 1996), p. 10 (hereafter cited as West, "Minority College"). Evidence that blacks' high school completion rates were closing in on those of whites can be found for other age groups as well, particularly when data for Hispanics are not separated out from those on whites and blacks. For instance, according to census data, which does not separate out Hispanics, the black-white gap in high school graduation rates for adults over age 25 narrowed between 1985 and 1995. In 1985, the high school completion rate of blacks over age 25 (60 percent) was lower than that of their white peers (76 percent). By 1995, 74 percent of blacks over age 25, compared to 83 percent of their white peers, were high school graduates. U.S. Bureau of the Census, *Current Population Reports*, P20-489, Jennifer Day and Andrea Curry, "Educational Attainment in the United States: March 1995," August 1996, pp. 2-3.

Moreover, when Hispanics are not separated out, the gap for 25-to-29-year-olds has been eliminated. When all 25- to 29-year old whites (including Hispanics) are compared to all 25- to 29-year-old blacks (including Hispanics), the black-white gap in graduation rates has been eliminated. U.S. Bureau of the Census, *Current Population Reports*, P20-489, Jennifer Day and Andrea Curry, "Educational Attainment in the United States: March 1995," August 1996, p. 3.

However, a 6 percentage point gap remains between the graduation rates of non-Hispanic whites and non-Hispanic blacks. DOEd, *Condition of Education 1996*, p. 92. (Except where pointed out, all of the black-white comparisons in this chapter are between non-Hispanic whites and non-Hispanic blacks). Furthermore, recently, scholars have cautioned that even if the high school graduation rates of young blacks are approaching those of whites, the quality of education received by blacks may be lower than that received by whites. *See* Millicent Lawson, "Graduation-Rate Data Spur Questions About School Quality," *Education Week*, vol. 16, no. 3 (Sept. 18, 1996), p. 6.

[83] "Notebook," *Chronicle of Higher Education*, June 21, 1996, p. A29.

[84] "Notebook," *Chronicle of Higher Education*, June 21, 1996, p. A29.

[85] "Notebook," *Chronicle of Higher Education*, June 21, 1996, p. A29.

[86] *See* table 4.2.

TABLE 4.2
High School Completion Rates of 18- to 24-Year-Olds by Gender and Race/Ethnicity

Percentages

	All students			Whites			Blacks			Hispanics		
	Total	**Males**	**Females**	**Total**	**Males**	**Females**	**Total**	**Males**	**Females**	**Total**	**Males**	**Females**
1973	80.7	80.2	81.2	82.8	82.2	83.4	66.8	66.4	66.9	55.2	55.7	55.0
1974	80.7	79.9	81.5	82.7	81.8	83.6	67.1	65.8	68.3	55.9	54.2	57.4
1975	80.8	80.3	81.3	83.2	82.7	83.6	64.8	61.8	67.1	57.5	56.5	58.4
1976	80.5	79.2	81.7	82.4	81.4	83.3	67.5	62.3	71.8	55.6	53.9	56.8
1977	80.5	79.0	82.0	82.3	80.9	83.7	67.5	63.5	70.8	54.7	52.5	56.5
1978	80.8	79.3	82.0	82.6	81.6	83.5	67.8	61.5	73.0	55.9	53.8	57.9
1979	80.1	78.5	81.7	82.1	80.7	83.4	67.1	61.7	71.5	55.2	54.2	56.3
1980	80.9	78.9	82.7	82.6	80.6	84.4	69.7	66.0	72.6	54.1	51.2	60.7
1981	80.6	78.2	82.8	82.2	79.9	84.4	70.9	66.7	74.5	55.8	50.4	60.0
1982	80.7	79.0	82.4	82.4	80.9	83.8	70.9	65.6	75.4	57.6	55.0	60.0
1983	80.4	77.9	82.9	82.2	79.8	84.5	70.9	66.5	74.8	54.8	49.2	62.3
1984	81.6	79.4	83.7	83.0	81.1	84.8	74.7	70.2	78.6	60.1	57.4	67.3
1985	82.4	80.4	84.3	83.6	81.7	85.4	75.6	72.3	78.4	62.9	58.2	67.3
1986	82.1	80.0	84.1	83.1	81.2	84.9	76.5	72.3	80.1	59.9	57.4	62.9
1987	81.4	79.4	83.2	82.3	80.6	84.0	76.0	71.3	80.0	61.6	59.5	63.8
1988	81.2	78.7	83.6	82.3	79.7	84.8	75.1	71.9	77.9	55.2	52.7	58.1
1989	81.0	78.7	83.2	82.1	79.9	84.2	76.1	72.2	79.3	55.9	52.5	59.8
1990	82.3	80.6	82.8	82.5	81.1	83.8	77.0	75.9	77.8	54.5	53.7	55.3
1991	80.9	78.9	82.9	81.7	79.3	83.8	75.1	71.8	77.8	52.1	47.8	56.9
1992	82.1	80.0	84.0	83.3	81.2	85.3	74.6	72.3	76.8	57.3	52.0	62.8
1993	82.0	80.2	83.9	83.4	82.0	85.2	74.8	72.8	76.7	60.7	58.1	63.1
1994	N/A	N/A	N/A	83.0	N/A	N/A	77.0	73.7	80.0	56.0	N/A	N/A

Source: Deborah Carter and Reginald Wilson, *Minorities in Higher Education* (Washington, D.C.: American Council on Education, June 1995), pp. 62-67; and Peter West, "Minority College Enrollment Up 5 Percent in 1994," *Education Week*, vol. xv, no. 39 (June 19, 1996), p. 10.

1980s, these completion rates increased to levels around 60 percent.[87] By 1994, however, Hispanics' secondary school completion rate fell to 56 percent, which was basically the same level as in 1981.[88] Thus, as of 1994, the gap between the percentage of white and Hispanic 18- to 24-year-olds who are high school graduates was only 1 percentage point lower than it was in 1973: 27 percentage points.

Gender Analysis. Throughout the past two decades, girls have completed high school at higher rates than males, regardless of racial/ethnic background.[89] In 1973 slightly more females between the ages of 18 and 24 had completed high school than males, and both genders had high school completion rates above 80 percent.[90] With minor fluctuations, this situation persisted throughout the next 2 decades. In 1993, females between the ages of 18 and 24 had high school completion rates of 84 percent, and their male counterparts had completion rates of 80 percent.[91] In 1993,[92] 85 percent of 18- to 24-year-old white women compared to 82 percent of males were high school graduates.[93] In the following year, 1994, the gender difference, in favor of females, was 3.9 percentage points.[94]

Similarly, between the early 1970s and early 1990s, 18- to 24-year-old black females were consistently more likely than their male peers to be secondary school graduates.[95] In 1973, 67 percent of black 18- to-24-year-old females, compared to 66 percent of their male peers, were high school graduates.[96] The female-male gap ranged from a low of 2 percent (most recently in 1990) to 11 percent (most recently in 1978). In 1994, 80 percent of black females between the ages of 18 and 24 were high school graduates (the highest completion rate since 1987), compared to less than 74 percent for their male counterparts.[97] In 1973 a slightly smaller percentage of Hispanic females between the ages of 18 and 24, compared to their male peers, were graduates of secondary school.[98] However, since 1974, female 18- to 24-year-old Hispanics have completed high school at greater rates than their male peers.[99] In 1974, 57 percent of Hispanic females compared to 54 percent of their male counterparts were high school graduates.[100] The gender gap, during the past two decades, in favor of females, has ranged from below 2 percent to more than 14 percent. In 1993[101] high school completion rates were 58 and 63 percent for 18- to 24-year-old Hispanic males and females, respectively.[102] As a result, the female-male gap was 5 percent. The following year, in 1994, the gender difference in favor of females was 6 percentage points.[103]

High School Dropout Rates

In the past two decades, high school dropout rates[104] for teenagers and young adults between the ages of 16 and 24 have decreased considerably, especially among whites and blacks; and the gap in dropout rates between these two groups has narrowed as well.[105] Higher percentages of students have persisted in school through completion, despite curricular changes that have made school more challenging, especially rising standards and increased course requirements.[106] In 1970, 15 percent of youths between the ages of 16 and 24 without high school diplomas were not in school; by 1993, the dropout rate for 16- to 24-year-old males remained basically the same (14.2 percent in 1970 and 12.3 percent in 1994) the rate for 16- to 24-year-old females almost was cut in half, falling from 15.7 percent to 8.1 percent.[107] Although in 1970 the high school dropout rate of 16- to 24-year-old blacks (28 percent) was higher than that of their white counterparts (13.2

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[87]*See* table 4.2.

[88]ACE, *Minorities*, table 1, and West, "Minority College."

[89]West, "Minority College."

[90]*See* table 4.2.

[91]*See* table 4.2.

[92]The year 1993 has the most recent complete data for all major racial/ethnic groups and both genders.

[93]*See* table 4.2.

[94]West, "Minority College." (Specific graduation rates were not published.)

[95]*See* table 4.2.

[96]ACE, *Minorities*, table 2.

[97]West, "Minority College."

[98]ACE, *Minorities*, table 2. *See* table 4.2.

[99]*See* table 4.2.

[100]*See* table 4.2.

[101]The year 1993 has the most recent complete data on graduation rates.

[102]ACE, *Minorities*, table 2.

[103]West, "Minority College." *See* table 4.2. In 1973, a slightly smaller percentage of Hispanic females between the ages of 18 and 24, than of their male peers, were high school graduates, but the difference was not statistically significant. Since 1974, female 18- to 24-year-old Hispanics have completed high school at greater rates than their male peers, but the difference has not been significant. In 1974, 57 percent of 18- to 24-year-old Hispanic females and 54 percent of their male counterparts were high school graduates. In 1993, high school completion rates were 58 and 63 percent for 18- to 24-year-old Hispanic males and females, respectively. *See* table 4.2.

[104]The dropout rate is the percentage who are not enrolled in school and do not have a high school diploma or equivalency certificate. *See* DOEd, *Education 1994*, p. 176.

[105]DOEd, *Digest 1994*, p. 110.

[106]DOEd, *Education 1995*, pp. iii, v., 76–78.

[107]DOEd, *Digest 1994*, p. 110.

percent), the dropout rate decreased more for blacks than for whites. By 1993 the dropout rate for blacks was 13.6 percent, while the dropout rate for whites was 7.9 percent.[108] As a result, the gap between the high school dropout rates of 16- to 24-year-old blacks and whites narrowed substantially between 1970 and 1994. Most of the decrease in the dropout rates for blacks occurred before 1986, when the rate began to stabilize around 14 percent.[109]

Unlike blacks, Hispanics have not closed the gap between their dropout rate and that of whites. In 1972, approximately one-third of 16- to 24-year-old Hispanics were high school dropouts. Since then Hispanics' dropout rate has fluctuated. In 1985 the dropout rate was 27.5 percent; however, in 1980, 1988, and 1991, the dropout rate exceeded 35 percent.[110] In 1993 the dropout rate for Hispanic 16- to 24-year-olds was 27.5 percent, nearly 4 times that of their white peers.[111] Consequently, Hispanics represented 29 percent of all dropouts but accounted for less than 12 percent of the 16–24-year-old population.[112]

Dropout rates of 16- to 24-year-olds in the United States tend to be directly related to family socioeconomic status. Students with family incomes in the lowest quintile had the highest dropout rate (24 percent), while those in middle and upper income ranges had rates of 10 and 2.7 percent, respectively.[113]

Grade retention can affect school dropout rates.[114] In 1992 the dropout rate for 16- to 24-year-olds who had repeated at least one grade was more than double that for those who had never been retained.[115] The dropout rates for students who had no ingrade retentions compared to those with at least one grade retention were 9.4 and 19.8 percent, respectively.[116]

Furthermore, when the highest grade repeated was between grades 7 and 10, the dropout rate was two to three times greater than when the highest grade repeated was at lower or higher grade levels.[117] One-third of students with at least one grade retention between grades 7 and 10 dropped out of high school, compared to fewer than 12 percent of students whose grade retention(s) was in the early elementary grades or their junior or senior year of high school.[118]

In 1992, 11.5 percent of all 16- to 24-year-olds, 10.5 percent of white students, 18.1 of blacks, and 10.9 percent of Hispanics had been retained in grade at least once.[119] The retention rate of females was much lower than that of males—8.8 percent compared to 14.2 percent.[120]

The experience of at least one grade retention has a statistically significant impact on the high school dropout rate of whites and blacks, but not Hispanics. White students who had never been retained in grade had a dropout rate of 6 percent—less than one-third the rate (18.8 percent) of students who had encountered at least one grade retention. For instance, white students who had never been retained in grade had a dropout rate of 6 percent – less than one-third the rate (19 percent of white students who had encountered at least one grade retention.[121] Similarly, one-fifth of 16- to 24-year-old blacks who repeated at least one grade left school before graduation, compared to 12 percent of their black peers who were promoted each year.[122]

Among students who had no ingrade retentions, white students had a lower high school dropout rate than their minority peers.[123] For instance, in 1992, the dropout rate was 6 percent for whites, compared to 12 percent and 29 percent, respectively, for their black and Hispanic peers. However, the gap in dropout rates for white and black 16- to 24-year old students who had experienced at least one in-grade retention was not different from zero: 19 percent compared to 20 percent. White and Hispanic 16- to 24-year-olds who had experienced at least one ingrade retention had significantly different dropout rates.[124]

Males and females between the ages of 16 and 24 who had never been retained had dropout rates of 9.5 and 9.3 percent, respectively.[125] Once males and females experienced at least one retention, dropout rates increased to 18.5 and 22 percent, respectively.[126]

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[108]Ibid.
[109]Ibid.
[110]Ibid.
[111]Ibid.
[112]ACE, *Minorities*, p. 9.
[113]Ibid.
[114]*See* table 4.3.
[115]DOEd, *Education 1994*, p. 30.
[116]Ibid. *See* table 4.3.
[117]DOEd, *Education 1994*, pp. 30 and 177.
[118]Ibid. *See* table 4.4.
[119]DOEd, *Education 1994*, p. 176.
[120]Ibid.
[121]U.S. Department of Education, National Center for Education Statistics, *The Educational Progress of Black Students, No. 2* (Washington, D.C.: May 1995), p. 6 (hereafter cited as DOEd, *Progress*); and DOEd, *Education 1994*, p. 176. *See* table 4.3.
[122]DOEd, *Progress*, p. 6, and DOEd, *Education 1994*, p. 176. *See* table 4.3.
[123]*See* table 4.3.
[124]DOEd, *Education 1994*, p. 176. *See* table 4.3.
[125]DOEd, *Education 1994*, p. 176.
[126]Ibid.

TABLE 4.3
High School Dropout Rates for 16- to 24-Year-Olds by Number of Retentions: 1992[2]

	All students	No retentions	One or more retentions
Total	11.0	9.4	19.8
Whites	7.7	6.0	18.3
Blacks	13.7	12.0	20.1
Hispanics	29.4	29.2	24.1
Males	11.3	9.5	18.5
Females	10.7	9.3	21.9

Source: U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1994*, by Thomas Smith et al. (Washington, D.C.: Government Printing Office, August 1994), p. 176.

[1] The percentage who are not enrolled in school and do not have a high school diploma or equivalency certificate. *See* DOEd, *The Condition of Education 1994*, p. 176.

[2] Data presented in this table were not available for students who are members of other races and ethnicities, such as Asian Americans and Native Americans.

TABLE 4.4
High School Dropout Rates[1] Among 16- to 24-Year-Olds, Based on Highest Grade Repeated: 1992

	Highest grade repeated			
	K-2	3-6	7-10	11-12
Percent retained	3.4	2.7	2.9	0.7
Dropout rate	11.5	17.4	33.0	11.8

Source: U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1994*, by Thomas Smith et al. (Washington, D.C.: Government Printing Office, August 1994), p. 177.

[1] The dropout rate is the percentage who are not enrolled in school and do not have a high school diploma or equivalency certificate. *See* DOEd, *The Condition of Education 1994*, p. 176.

Educational Attainment: College Attendance and Completion

Postsecondary Education Participation Rates: Immediate Entry Following High School Graduation

Most students who enroll in college do so by the October following high school graduation.[127] The percentage of a high school graduating class enrolled in college the October following graduation is a good indicator of the proportion of the class who ever will enroll in a postsecondary institution.[128] The percentage of high school graduates who make such an immediate transition to college has risen over time. Sixty-two percent of the Nation's 1993 high school graduating class was enrolled in college by October 1993, whereas only 49 percent of the class of 1972 was enrolled by October 1972.[129]

Historically, more high school graduates have enrolled in 4-year than 2-year colleges, but the percentage of students enrolling in 2-year colleges has increased relative to those enrolling in 4-year institutions.[130] Approximately 22 percent of students who graduated from high school in 1993 were enrolled in 2-year colleges by the following October, up from 15 percent in 1973, and 39 percent were enrolled in 4-year schools (up from 32 percent).[131]

Over the past two decades, whites have been more likely than blacks or Hispanics to enroll in college the fall after their high school graduation. Since the late 1980s, females have been more likely than males to enroll in college immediately after high school graduation.[132]

Race/Ethnicity Analysis. The estimated percentages of blacks and Hispanics enrolling immediately in college fluctuated widely during the period between 1973 and 1993. Thus, no clear pattern can be discerned in comparing minorities' immediate college entry rates with those of whites.[133]

Gender Analysis. In 1973 the enrollment rate in college directly after high school graduation was lower for females (43 percent) than for their male peers (50 percent).[134] However, female high school graduates have made more substantial increases in direct college enrollment than have their male peers. By 1993, 64 percent of females in comparison to 59 percent of their male peers were enrolled in college by the October following high school graduation.[135] As a result, the gender gap in favor of males, which was 7 percentage points in 1973, has reversed itself. Females are now more likely to enroll in college directly from the high school than are males.

The historical trend of male high school graduates attending college in greater proportions than their female counterparts began to reverse itself in 1988.[136] In that year, approximately 61 percent of females, compared to 57 percent of their male peers enrolled directly in college.[137] However, even in certain years before then, recent female high school graduates had a higher enrollment rate in postsecondary institutions than did their male counterparts.[138] For instance, in 1976, 50.3 percent of female high school graduates, but 47.2 percent of their male peers, made an immediate transition to college.[139]

Postsecondary Education Participation Rates: Enrollment in College by the Nation's 18- to 24-Year-Old High School Graduates

In 1973, 30 percent of high school graduates between the ages of 18 and 24 were enrolled in colleges and universities.[140] By 1993 the total participation rate of this age group attending the Nation's postsecondary institutions increased to 41 percent.[141] Since the 1970s, at least 50 percent of individuals that completed high school have enrolled in college within several months following their graduation; however, additional students may enroll in postsecondary institutions within the following 6 or 7 years. Not all students have immediate accessibility to a college or university; some may face economic barriers; or others may chose to work, enter the military, travel, or engage in other pursuits.[142]

Race/Ethnicity Analysis. The college enrollment rate of young black high school graduates has increased considerably over the past 20 years. In 1994, 36 percent of black high school graduates between the ages of 18 and 24 were enrolled in college, up from 24 percent in 1973.[143]

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[127]DOEd, *Education 1995*, p. 42.
[128]Ibid.
[129]Ibid. *See* table 4.5.
[130]Ibid.
[131]Ibid.
[132]Ibid., pp. 194–95.
[133]*See* table 4.5.
[134]DOEd, *Education 1995*, p. 194. *See* table 4.5.
[135]DOEd, *Education 1995*, p. 194.
[136]Ibid.
[137]*See* table 4.5.
[138]DOEd, *Education 1995*, p. 194.
[139]Ibid.
[140]ACE, *Minorities*, table 1.
[141]Ibid. *See* table 4.6.
[142]DOEd, *Education 1995*, p. 42.
[143]ACE, *Minorities*, table 1; and "ACE: Education Gap Closing on Minority Enrollment," *Education Daily*, June 10, 1996 (vol.

TABLE 4.5
Percentage of High School Graduates Who Enroll in College the October Following Graduation, by Gender and Race/Ethnicity[1]

	All students	Males	Females	Whites	Blacks	Hispanics
1972	49.2	52.7	46.0	49.7	44.6	45.0
1973	46.6	50.0	43.4	47.8	32.5	54.1
1974	47.6	49.4	45.9	47.2	47.2	46.9
1975	50.7	52.6	49.0	51.1	41.7	58.0
1976	48.8	47.2	50.3	48.8	44.4	52.7
1977	50.6	52.1	49.3	50.8	49.5	50.8
1978	50.1	51.1	50.3	50.5	46.4	42.0
1979	49.3	50.4	49.3	49.9	46.7	45.0
1980	49.3	46.7	51.8	49.8	42.7	52.3
1981	53.9	54.8	53.1	54.5	42.7	52.1
1982	50.6	49.1	52.0	52.7	35.8	43.2
1983	52.7	51.9	53.4	55.0	38.2	54.2
1984	55.2	56.0	54.5	59.0	39.8	44.3
1985	57.7	58.6	56.8	60.1	42.2	51.0
1986	53.8	55.8	51.9	56.8	36.9	44.0
1987	56.8	58.3	55.3	58.6	52.2	33.5
1988	58.9	57.1	60.7	61.1	44.4	57.1
1989	59.6	57.6	61.6	60.7	53.4	55.1
1990	60.1	58.0	62.2	63.0	46.8	42.7
1991	62.5	57.9	67.1	65.4	46.4	57.2
1992	61.9	60.0	63.8	64.3	48.2	55.0
1993	61.5	58.7	64.0	62.9	55.6	62.2
1994	61.9	60.6	63.2	64.5	50.8	49.1

Source: U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1996*, by Thomas Smith et al. (Washington, D.C.: Government Printing Office, June 1995), p. 52 and supplemental tables provided by NCES.

[1] Data presented in this table were not available for students who are members of other races and ethnicities, such as Asian Americans and Native Americans.

TABLE 4.6
Percentage of High School Graduates Between the Ages of 18 and 24, Who Are Enrolled in College, by Gender and Race/Ethnicity[1]

	All students	Males	Females	Whites	Blacks	Hispanics
1973	29.7	34.6	25.3	30.2	23.8	29.1
1974	30.5	34.7	26.7	30.6	26.2	32.3
1975	32.5	36.2	29.2	32.3	31.5	35.5
1976	33.1	35.6	30.9	32.8	33.4	35.9
1977	32.5	35.6	29.7	32.3	31.3	31.5
1978	31.4	34.1	28.8	31.3	29.6	27.1
1979	31.2	32.9	29.6	31.3	29.4	30.2
1980	31.8	33.4	30.0	32.1	27.6	29.9
1981	32.5	34.7	30.4	32.7	28.0	29.9
1982	33.0	34.5	31.6	33.3	28.1	29.2
1983	32.5	35.0	30.3	33.0	27.0	31.5
1984	33.2	36.0	30.6	33.9	27.2	29.9
1985	33.7	35.3	32.3	34.9	26.0	26.8
1986	34.0	35.8	33.0	34.5	28.6	29.4
1987	36.0	38.6	34.5	37.2	29.1	28.2
1988	37.0	38.3	36.3	38.4	27.8	30.8
1989	38.0	38.3	38.0	39.7	30.5	28.3
1990	39.0	40.1	38.4	40.3	32.4	28.4
1991	40.8	41.7	41.0	42.3	30.3	33.9
1992	41.6	40.9	42.8	42.5	33.4	36.1
1993	41.0	41.9	41.0	42.0	32.2	34.9
1994	42.2	N/A	N/A	43.6	35.5	32.9

Source: For males and females, Deborah Carter and Reginald Wilson, *Minorities in Higher Education* (Washington, D.C.: American Council on Education, June 1995), pp. 62-64; for all others, U.S. Department of Education, *The Condition of Education 1996* by Thomas Smith et al. (Washington, D.C.: Government Printing Office, 1996), p. 4.

[1] Data presented in this table were not available for students who are members of other races and ethnicities, such as Asian Americans and Native Americans.

The college enrollment rate of Hispanic high school graduates increased more modestly, rising from 29 percent in 1973 to 33 percent in 1994.[144] As a result, the gap between enrollment rates of white and Hispanic 18- to 24-year-old high school graduates increased from 1 percent (in 1973) to 10 percent (in 1994). The increases in the white-minority gaps in college participation reflect that white high school graduates were consistently more likely than blacks or Hispanics to participate in higher education.[145] Between the 1970s and early 1990s, similar to their progress on other indicators of educational attainment, minorities have made gains in their access to higher education.[146] However, both blacks and Hispanics continue to trail behind whites with respect to the percentage of 18-to 24-year-old high school graduates enrolling in postsecondary institutions.[147] Between 1993-1994, college enrollment rates for minorities rose almost 5 percent, up from a 2.4 percent gain during the previous year.[148] Although blacks, Hispanics, and Native Americans are about one-fourth of the Nation's high school graduates, minority students are only 16 percent of the enrollment at 4-year colleges.[149]

Gender Analysis. In 1973 the college enrollment rate of 18- to 24-year-old female high school graduates (25 percent) was considerably lower than that of their male peers (35 percent).[150] However, in the next 20 years, the enrollment rate increased more for women than for men. By 1993, 41 percent of female high school graduates, compared to 42 percent of their male peers were participating in postsecondary education.[151] As a result, the gap in college enrollment by 18- to 24-year-old male and female high school graduates decreased from 10 percent in 1973 to 1 percent in 1993.[152] Although some fluctuations occurred in college enrollment rates of male high school graduates in the 1980s, by 1993 more than 40 percent of men in this age group were attending a postsecondary institution.[153] Also during the 1970s through early 1990s, the enrollment in college rate for females increased almost consistently each year, so that by 1993, their level of participation in higher education was almost on par with their male peers.[154]

Trends in Undergraduate College Completion

In 1994, 27 percent of the Nation's 25- to 29-year-old high school graduates had completed at least 4 years of college, up from 22 percent in 1971.[155] The completion rate had risen to 28 percent by 1977, followed by fluctuations until 1989, when it leveled off to the current rate.[156]

Race/Ethnicity Analysis. Among high school graduates who enrolled in postsecondary education for the first time in 1989–1990, 2-year persistence rates for students pursuing vocational certificates, associate's degrees, and undergraduate degrees were generally similar for blacks and whites.[157] However, completion of at least 4 years of undergraduate education is far lower among 25- to 29-year-old black high school graduates than it is among whites.[158] For instance, in 1994 about 16 percent of 25- to 29-year-old blacks had completed 4 years of college,[159] up from 12 percent in 1971.[160] Although the college completion rate of 25- to 29-year-old blacks rose from 12 percent in 1971 to 18 percent in 1995, their college completion rate remained below that of 25- to 29-year-old white high school graduates, whose college completion rates increased from 23 percent to 30 percent during the period.[161]

In March 1995, slightly more than one-fourth of white high school graduates over age 25 had bachelor's or graduate degrees, compared to 13 percent of blacks, a white-black attainment gap of 12 percentage points.[162] This gap was smaller 10 years earlier, when 20 percent

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29, no. 111), pp. 1–2 (hereafter cited as "ACE: Gap"). *See* table 4.6.

[144]Ibid.

[145]ACE, *Minorities*, table 1. *See* table 4.6.

[146]The number of Hispanic 18- to 24-year-olds on college campuses is increasing rapidly (a function of population changes and immigration). As a result, their "share of enrollment" relative to whites is increasing. Between 1973 and 1993, the number of 18- to 24-year-old Hispanics attending the Nation's postsecondary institutions increased from 206,000 to 602,000. Overall, participation by all 18- to 24-year-old high school graduates at postsecondary institutions increased from 6.05 million to 8.19 million (a 35 percent increase). Consequently, the percentage of all college and university students who are Hispanic increased from 3 percent (in 1973) to 7 percent (in 1993). *See* ACE, *Minorities*, table 1.

[147]*See* table 4.6.

[148]"ACE: Gap."

[149]West, "Minority College."

[150]*See* table 4.6.

[151]ACE, *Minorities*, table 2.

[152]ACE, *Minorities*, table 2. *See* table 4.6.

[153]ACE, *Minorities*, table 2.

[154]Ibid. *See* table 4.6.

[155]*See* table 4.7.

[156]*See* table 4.7.

[157]DOEd, *Progress*, p. 16.

[158]Ibid.

[159]*See* table 4.7.

[160]DOEd, *Education 1995*, p. 246. *See* table 4.7.

[161]Ibid.

[162]"Notebook," *Chronicle of Higher Education*, June 21, 1996, p. A29.

TABLE 4.7
Percentage of 25- to 29-Year-Old High School Graduates Who Have Completed at Least Four Years of College, by Gender and Race/Ethnicity[1]

	All students			Whites			Blacks			Hispanics		
	Total	Males	Females	Total	Males	Females	Total	Males	Females	Total	Males	Females
1971	22.0	25.8	18.1	23.1	27.0	19.1	11.5	12.1	10.9	10.5	15.4	5.8
1972	23.7	27.3	20.2	24.9	28.6	21.1	13.1	11.6	14.3	7.8	9.5	6.4
1973	23.6	26.8	20.5	24.8	28.3	21.3	12.7	11.3	13.8	10.8	12.4	9.7
1974	25.3	28.7	21.8	27.2	31.1	23.2	11.5	12.3	11.0	10.1	8.9	11.2
1975	26.3	29.7	22.9	27.5	31.1	23.7	14.7	15.3	14.2	16.6	19.7	13.4
1976	28.0	32.0	24.1	29.3	33.5	25.0	17.6	16.5	18.6	12.7	17.9	8.2
1977	28.1	31.2	25.1	29.8	33.4	26.3	16.9	16.5	17.3	11.5	11.3	11.7
1978	27.3	30.2	24.4	28.9	32.6	25.3	15.2	13.6	16.5	17.1	16.4	17.9
1979	27.0	29.9	24.2	28.6	31.6	25.5	16.6	17.8	15.7	12.9	14.2	11.4
1980	26.3	28.1	24.5	28.0	30.1	26.0	15.0	14.0	15.8	13.2	15.0	11.8
1981	24.7	26.6	22.8	26.3	28.4	24.2	14.9	15.4	14.5	12.5	14.4	10.9
1982	25.2	26.9	23.4	26.7	28.8	24.6	15.6	14.6	16.4	15.9	17.8	14.2
1983	26.2	27.8	24.6	27.4	29.4	25.4	16.2	16.5	15.9	17.8	16.8	18.8
1984	25.5	27.1	24.0	27.0	28.5	25.4	14.8	17.1	13.0	18.1	17.0	19.2
1985	25.7	26.9	24.6	27.3	28.6	26.0	14.4	12.9	15.6	18.2	18.6	17.7
1986	26.0	26.7	25.3	28.1	29.1	27.1	14.2	11.9	16.3	15.3	15.4	15.2
1987	25.6	26.1	25.2	27.6	28.0	27.1	13.8	14.0	13.6	14.5	15.7	13.4
1988	26.4	27.6	25.2	28.0	29.1	26.9	14.8	15.3	14.4	18.1	19.8	16.3
1989	27.3	28.3	26.5	29.5	30.5	28.5	15.4	15.0	15.6	16.5	15.7	17.2
1990	27.1	28.0	26.2	29.3	30.0	28.6	16.4	18.6	14.5	14.0	12.9	15.2
1991	27.2	27.0	27.3	29.7	29.7	29.8	13.4	13.7	13.1	16.3	14.4	18.1
1992*	27.3	26.9	27.8	30.0	29.5	30.4	13.7	14.2	13.2	15.6	14.3	17.0
1993*	27.3	27.2	27.4	29.8	30.0	29.5	16.1	14.8	17.2	13.6	12.1	15.3
1994*	27.0	26.6	27.4	29.7	29.8	29.6	16.2	14.0	17.9	13.3	11.3	15.5
1995*	28.4	28.4	28.5	31.2	30.9	31.4	17.8	19.7	16.1	15.5	14.0	17.1

Source: U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1996*, by Thomas Smith et al. (Washington, D.C.: Government Printing Office, June 1996), p. 92, and supplemental tables provided by NCES.

* Beginning in 1992, the Current Population Survey changed the questions it used to obtain the educational attainment of respondents. Data from 1992 to 1994 refer to percentage of 25- to 29-year-olds who have a bachelor's degree or more. *See* DOEd, *The Condition of Education 1995*, p. 247.

[1] Data presented in this table were not available for students who are members of other races and ethnicities, such as Asian Americans and Native Americans.

of whites and 11 percent of blacks had earned undergraduate degrees.[163]

From elementary school on, Hispanics lag behind whites in their performance on various measures of educational achievement and indicators of attainment. The gap between college completion rates of Hispanic and white high school graduates has not closed, and the college completion rate of 25-to 29-year-old Hispanics is far lower than it is for whites.[164]

In 1994 approximately 13 percent of Hispanic 25- to 29-year-old high school graduates completed at least 4 years of college, up from about 11 percent in 1971.[165] Their white peers' college completion rate increased somewhat more (from 23 percent in 1971 to 30 percent in 1994).

Gender Analysis. Similar to their progress on other educational indicators relative to men, since 1971 the percentage of female high school graduates completing at least 4 years of college has increased significantly, so that they are now as likely, if not more (in some racial/ethnic groups) to earn this credential than are their male peers.[166] In 1971 the percentage of female high school graduates who completed at least 4 years of college was lower than that of their male counterparts. Specifically, 18 percent of 25- to 29-year-old female high school graduates completed at least 4 years of postsecondary education, compared to 26 percent of their male peers.[167] However, the increase in the college completion rate for females was greater than that for males between 1971 and 1994. By 1994 about 27 percent of both male and female 25- to 29-year-old high school graduates had finished at least 4 years of college.[168] As a result, the gap between college completion for males and females closed from the 8 percent level in 1971.

Among racial/ethnic groups, the greatest progress in the 1970s through the early 1990s, with respect to college completion, was made by Hispanic high school graduates.[169] In 1971 fewer than 6 percent of 25- to 29-year-old Hispanic female high school graduates completed at least 4 years of college, compared to 15.4 percent for their male counterparts. Although various and significant fluctuations occurred during the 1970s and 1980s (for both genders), by 1994 about 16 percent of 25- to 29-year-old Hispanic female high school graduates completed college compared to 11 percent of their male peers.[170] As a result, the gender gap between college completion rates of Hispanic young adults decreased from more than 9 percentage points in 1971, and the percentage of Hispanic females who have attained this level of education now exceeds that of their male peers.[171]

Between 1971 and 1994, for both black males and black females, college completion rates of high school graduates between the ages of 25 and 29 have increased overall, but with fluctuations. The college completion rates for both males and females have ranged from 11 percent to 19 percent, and annual changes have ranged from under 0.1 percentage point (e.g., between 1991 and 1992 for females, and between 1976 and 1977 for males) to more than 4 percentage points (e.g., between 1975 and 1976 for females, and between 1990 and 1991 for males).[172] In addition, among black high school graduates between the ages of 25 and 29, there is no consistent gender gap. In any single year, black female high school graduates can have a higher college completion rate than their male peers; and then the following year, the reverse can occur (between 1988 and 1989, for examples).[173] In 1994, 18 percent of black female high school graduates, compared to 14 percent of their male peers completed at least 4 years of postsecondary education. Yet, in 1990, 15 percent of black female high school graduates, compared to 19 percent of their male peers attained this level of education.[174]

In 1971, 19 percent of white female 25- to 29-year old high school graduates completed at least 4 years of college, compared to 27 percent of their male peers.[175] By 1994, there was no significant difference in the college completion rates of white male and female high school graduates in this age group.[176]

Education of Students with Disabilities

This section focuses on characteristics of and education programs for students with learning disabilities, serious emotional disturbance (SED)/behavioral disorders,[177] and students who are

[163]Ibid.
[164]DOEd, *Education 1995*, p. 11. *See* table 4.7.
[165]DOEd, *Education 1995*, p. 246.
[166]DOEd, *Education 1995*, p. 246. *See* table 4.7.
[167]Ibid.
[168]Ibid.
[169]DOEd, *Education 1995*, p. 246.
[170]Ibid.
[171]*See* table 4.7.
[172]*See* table 4.7.
[173]*See* table 4.7.
[174]*See* table 4.7.
[175]DOEd, *Education 1995*, p. 246.
[176]DOEd, *Education 1995*, p. 246.
[177]Data on students with behavioral disorders are merged with data on students with serious emotional disturbance. Unless otherwise stated, qualitative or quantitative information

classified as educable mentally retarded (EMR).[178] Although students with at least 12 types of disabilities,[179] in addition to those who have multiple disabilities, have been identified and are currently served in federally sponsored special education programs, students with the aforementioned conditions are the most prevalent among the beneficiaries of special education services.[180]

Similar to their peers being served entirely by regular education, students with disabilities have diverse demographic characteristics and approaches to learning effectively and efficiently. In addition, they receive instruction from educators (e.g., teachers, aides, and other personnel) who have various credentials and experiences. Moreover, students with disabilities also achieve and attain a range of (a) outcomes as they progress through school (such as proficiency levels on assessments of core subjects, accumulation of credits in various academic subjects, and ingrade retentions versus promotions), as well as (b) outcomes as they exit their formal public K–12 education (e.g., officially graduate with diploma or certificate versus drop out).

Defining Educable Mental Retardation, Learning Disabilities, Behavioral Disabilities, and Serious Emotional Disturbance[181]

Educable Mental Retardation

The most widely recognized definition of "mental retardation" is from the *Manual on Terminology and Classification in Mental Retardation*, relied upon by the American Association on Mental Retardation.[182] Before 1992 the manual defined mental retardation as follows:

> significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period, a definition almost identical to the Federal definition.[183]

This definition formed the basis for the definition found in the Individuals with Disabilities Education Act (IDEA) and its regulations.[184]

Current IDEA regulations define "mental retardation" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance."[185] The phrase "general intellectual functioning" refers to results of individual intelligence tests.[186] Consequently, intelligence tests often are a primary means of identifying students with mental retardation. "Significantly subaverage intellectual functioning" means an IQ of 70 to 75 or below those scores on a standardized individual

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presented pertains to both—students with serious emotional disturbance and behavioral disorders.

[178]Data on students who are educable mentally retarded can be incorporated into a general category classified as "mentally retarded." As a result, data on students classified as "mentally retarded" can be based on data about students who have other severity levels (e.g., trainable, profound) of mental retardation.

[179]These terms are defined in 34 C.F.R. § 300.7 (1995).

[180]Data on the number of beneficiaries of federally supported special education programs reveal that students with learning disabilities, serious emotional disturbance/behavioral disorders, and mental retardation are among the four most frequently identified and represented disabilities. *See* DOEd, *Digest 1995*, p. 65.

[181]Among disability advocates, educators, and the medical community, there is some disagreement on the definitions of educable mental retardation, learning disabilities, behavioral disabilities, and serious emotional disturbances. This chapter relies on definitions offered in Federal regulations. Controversy regarding these definitions is mentioned as necessary. The origins of these disability terms and the current Federal definitions are presented below. In addition, to assist the reader in understanding these disabilities, a summary of characteristics typical of students with these disabilities is also offered.

[182]Bill R. Gearheart, *Special Education for the '80s* (St. Louis, MO: The C.V. Mosby Company, 1980), p. 253 (citing H. Grossman, ed., American Association on Mental Deficiency, *Manual on terminology and classification in mental retardation* (Baltimore: Garamond/Pridemark Press, 1977)). After 1980 the American Association on Mental Deficiency renamed itself the American Association on Mental Retardation. Charlotte Hawkins-Shepard, "Mental Retardation," ERIC Digest EDO–EC–93–11 (September 1994) (Reston, VA: Clearinghouse on Disabilities and Gifted Education, Council on Exceptional Children, 1994).

[183]Gearheart, *Special Education for the '80s*, p. 253 (citing Grossman, *Manual on terminology and classification*, p. 11).

[184]In 1992 the American Association on Mental Retardation created a new definition of mental retardation:

Mental retardation refers to substantial limitations in present function. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work. Mental retardation manifests before age 18.

The new definition replaces a description of mental retardation as a state of global incompetence with references to a pattern of limitations. It looks at how people function in various contexts of everyday life. Hawkins-Shepard, "Mental Retardation."

[185]34 C.F.R. § 300.7(b)(5) (1994).

[186]Gearheart, *Special Education for the '80s*, p. 253 (citing Grossman, *Manual on terminology and classification*, p. 122).

intelligence test.[187] The "developmental period" is the period between birth and age 18. "Adaptive behavior" is a measure of the degree to which an individual "meets the standards of personal independence and social responsibility expected of his age and cultural group."[188]

Mental retardation can be caused by any conditions that impair development of the brain before birth, during birth, or in the childhood years. The causes can be categorized generally as (1) genetic conditions, such as Down syndrome; (2) problems during pregnancy; (3) problems at birth; (4) problems after birth; and (5) poverty and cultural deprivation.[189] Some of the characteristics of students with mental retardation include delays in the development of language, and speech and motor skills significantly below that in same-age children who do not have mental retardation. Children with mental retardation also may be generally below the normal height and weight of same-age children, and they may have a higher incidence of vision and hearing impairment. In contrast to their nondisabled classmates, students with mental retardation often have problems with attention, perception, memory, problem solving, and logical thought. They are slower in learning how to learn and find it harder to apply what they have learned to new situations or problems.[190]

The American Association on Mental Retardation classifies mental retardation into four levels: mild, moderate, severe, and profound.[191] Parallel to this classification is an alternative system commonly used in public education: the educable mentally retarded (EMR), the trainable mentally retarded (TMR), the severely mentally retarded and dependent mentally retarded, and those requiring life support care.[192] The use of the term educable mental retardation refers to children and youth who have mild mental retardation. Students with educable mental retardation will function only somewhat slower than average in learning new skills and information.[193]

Learning Disabilities

Although learning disabilities were recognized before 1963, it was not until that year that the term received formal acceptance and use. On April 6, 1963, Dr. Samuel Kirk, a highly respected and recognized special educator, presented a speech on the use of labeling before a parent group, the Fund for Perceptually Handicapped Children.[194] In this speech Dr. Kirk suggested the use of the term "learning disabilities" to describe "children 'who have disorders in development in language, speech, reading, and associated communication skills needed for social interaction.'" He noted that he did *not* include within this group children who have sensory handicaps such as blindness or deafness or those with generalized mental retardation."[195] Dr. Kirk later headed the National Advisory Committee on Handicapped Children. The advisory committee's first annual report made major recommendations on educating children with disabilities. In addition, it recognized the need for a definition for learning disabilities and offered its own as the first national definition of the term.[196]

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[187]Hawkins-Shepard, "Mental Retardation." *See also* Gearheart, *Special Education for the '80s*, p. 253 (citing Grossman, *Manual on terminology and classification*, p. 122).

[188]Gearheart, *Special Education for the '80s*, p. 253 (citing Grossman, *Manual on terminology and classification*, p. 122).

[189]The Arc, "Q&A: Introduction to Mental Retardation," September 1993. *See also* Gearheart, *Special Education for the '80s*, pp. 258–64.

[190]Hawkins-Shepard, "Mental Retardation."

[191]Gearheart, *Special Education for the '80s*,p. 253 (citing Grossman, *Manual on terminology and classification*.

[192]Gearheart, *Special Education for the '80s*, p. 254. Although EMR, TMR, the severely or dependent MR, and those requiring life support do not equate to the mildly, moderately, severely, and profoundly retarded, respectively, the terms have common relations. Ibid.

[193]Hawkins-Shepard, "Mental Retardation."

[194]Parents from that group later formed the Association for Children with Learning Disabilities (ACLD), which lobbied for provisions in the Education for All Handicapped Children Act, Pub. L. No. 94–142 (today known as the IDEA), for the learning disabled. Gearheart, *Special Education for the '80s*, p. 179. In 1989, ACLD changed its name to the Learning Disabilities Association of America (LDA). Donald D. Hammill, "A Brief Look at the Learning Disabilities Movement in the United States," *Journal of Learning Disabilities*, vol. 26, no. 5 (May 1993), p. 296.

[195]Gearheart, *Special Education for the '80s*, p. 179 (citing S. Kirk, "Behavioral diagnosis and remediation of learning disabilities," *Proceedings of the First Annual Meeting of the Conference on the Exploration into the Problems of the Perceptually Handicapped Child*, vol. 1 (Apr. 16, 1963)).

[196]Gearheart, *Special Education for the '80s*, pp. 179–80. That definition was as follows: Children with special learning disabilities exhibit a disorder in one or more of the basic psychological processes involved in understanding or in using spoken or written languages. These may be manifested in disorders of listening, thinking, talking, reading, writing, spelling, or arithmetic. They include conditions which have been referred to as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, developmental aphasia, etc. They do not include learning problems which are due primarily to visual, hearing, or motor handicaps, to mental retardation, emotional disturbance, or to environmental disadvantage. Gearheart, *Special Education for the '80s*, pp. 179–80 (citing *First Annual Report of the National Advisory Committee on Handicapped*

The definition of "specific learning disability" included by the U.S. Department of Education in its regulations for the IDEA reflects the essence of the advisory committee's first national definition, definitions used in State laws, and definitions or descriptions used by educational scholars. Common elements include (1) language disorders and perceptual disorders as the leading components of the definition; (2) the concept of a significant discrepancy between academic achievement and potential to achieve; and (3) the exclusion of the mentally retarded, blind, and deaf.[197]

Current IDEA regulations define "children with specific learning disabilities" as "those children who have a disorder in one or more of the basis psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations."[198] The disorders include conditions, such as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.[199] However, children with specific learning disabilities are not "children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage."[200]

Unlike students with mental retardation, students with learning disabilities generally possess an average or above-average intellect. Consequently, the level of intelligence is not a cause of the learning problems. Usually, the learning problems are a result of differences in the structure and function of the brain. For example, students with perceptual handicaps have difficulty in accurately processing, organizing, and discriminating among visual, auditory, or tactile information. They may say that "cap" and "cup" sound the same or that "b" and "d" look the same.[201] Students with dyslexia have problems in language processing. They have difficulties in translating language to thought, as in listening and reading, or in translating thought to language, as in writing or speaking. The problems in language processing usually are characterized by a lack of awareness of sounds in words; difficulty in identifying single words; difficulty spelling; difficulty in identifying sequences of words, letters, or numbers; problems in reading comprehension; difficulty expressing thoughts in written or oral form; delayed spoken language; imprecise or incomplete interpretation of language that is heard; confusion about directions in space or time; confusion about right or left handedness; or difficulty with handwriting and mathematics.[202]

Behavioral Disabilities

Although neither law nor regulations provide a definition for "behavioral disabilities," members of the education and psychology fields recognize the term "behavioral disorders."[203] There is disagreement, however, on whether behavior disorders are a separate and distinct category of disabilities or a broader category that includes those with serious emotional disturbance, social maladjustment, and attention deficit

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Children, Washington, D.C., Office of Education, Department of Health, Education and Welfare, 1968).

[197]Gearheart, *Special Education for the '80s*, p. 176 (citing E. Bailey, "Learning disabilities definitions in the literature and state regulations" (unpublished study, University of Northern Colorado, 1977).

[198]20 U.S.C. § 1401(a)(15) (1988 & Supp. V); 34 C.F.R. § 300.7(b)(10) (1995).

[199]*Id.* Brain injury is the physical damage to brain tissue or structure that occurs before, during, or after birth. Minimal brain dysfunction is a medical and psychological term originally used to refer to the learning difficulties that seemed to result from identified or presumed damage to the brain. The term reflects a medical rather than an educational or vocational orientation. Developmental aphasia is a severe language disorder that is presume to be due to brain injury rather than because of a developmental delay in the normal acquisition of language. "Learning Disabilities: Glossary of Some Important Terms," ERIC Digest EDO–DC–92–7 (December 1992) (Reston, VA: Clearinghouse on Handicapped and Gifted Children, Council on Exceptional Children). Perceptual handicaps and dyslexia are defined in the main text.

[200]20 U.S.C. § 1401(a)(15) (1988 & Supp. V); 34 C.F.R. § 300.7(b)(10) (1995).

[201]"Learning Disabilities: Glossary of Some Important Terms," ERIC Digest EDO–DC–92–7 (December 1992) (Reston, VA: Clearinghouse on Handicapped and Gifted Children, Council on Exceptional Children).

[202]The Orton Dyslexia Society, *Dyslexia: Defining the Problem* (Baltimore, MD: Author).

[203]*See* Michael Bullis and Hill M. Walker, "Behavior Disorders and the Social Context of Regular Class Integration: A Conceptual Dilemma," in John Wills Lloyd, Nirbhay N. Singh, and Alan C. Repp, eds., *The Regular Education Initiative: Alternative Perspectives on Concepts, Issues, and Models* (Sycamore, IL: Sycamore Publishing Co., 1991), pp. 75–93; Council for Children with Behavioral Disorders, "A Position Paper of the Council for Children with Behavioral Disorders," *Behavioral Disorders* (May 1985), p. 167; Council for Children with Behavioral Disorders, "Position Paper on Definition and Identification of Students with Behavior Disorders," Sept. 11, 1995 *Behavioral Disorders* (November 1987), p. 9; and "Behavioral Disorders: Focus on Change," ERIC Digest EDO–ED–93–1 (Reston, VA: Clearinghouse on Handicapped and Gifted Children, Council for Exceptional Children, 1993).

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hyperactivity disorder.[204] Further, there is confusion and overlap in use of the terms "conduct disorders," "emotional disabilities," "behavioral disorders," "serious emotional disturbances," and "emotional and behavioral disorders" to describe students who exhibit similar traits.[205]

Generally, students with behavioral disorders demonstrate behavior that is noticeably different from that expected in school or the community.[206] They exhibit some form of behavior that is judged to be different from that which is expected in the classroom.[207] In some cases, students with behavioral disorders may be particularly uninvolved in their learning due to problems with self-concept, lack of a feeling of belonging to the school, and repeated failures in school.[208]

Serious Emotional Disturbance

Educational and medical literature have offered many definitions of emotional disturbance. For example, emotional disturbance has been defined as "having moderate to marked reduction in behavioral freedom, which in turn, reduces his ability to function effectively in learning or working with others."[209] It has been described "[as] children. . .in conflict (nothing more or less) with their environment. They might be having a relationship problem with their teacher or a peer, they might be in conflict with themselves, or they may be victims of uncontrollable circumstances in their homes."[210] In addition, the emotionally disturbed pupil has been defined as "one who is persistently unable to cope with a reasonable school environment even though expectations are geared to his age and potential. . . The specific patterns or manifestations of disturbance are many and range in depth."[211]

There are many reasons for the differences in definitions. Definitions may vary based on the discipline of the author, whether educator, psychiatrist, or clinical psychologist. Further, there is no agreement on terminology or descriptive phrases that are common among the differing definitions. There is disagreement on the degree of maladjustment needed to qualify as emotionally disturbed. Finally, there is disagreement on the number of inappropriate behaviors required to be considered emotionally disturbed.[212]

Federal regulations for the IDEA describe "serious emotional disturbance" (SED) as:

> a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance—
>
> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
>
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
>
> (C) Inappropriate types of behavior or feelings under normal circumstances;

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[204]Forness and Knitzer have described "behavior disorders" as "a generic, all-inclusive term used by special educators to denote disturbances of feelings, emotion, or behavior." Steven R. Forness and Jane Knitzer, "A New Proposed Definition and Terminology to Replace 'Serious Emotional Disturbance' in Individuals with Disabilities Education Act," *School Psychology Review*, vol. 21, no. 1 (1992), p. 13 (citing T.M. Achenbach, *Assessment and taxonomy of child and adolescent psychopathology* (Beverly Hills, CA: Sage, 1985). Reid, Maag, and Vasa note, "[T]here is insufficient evidence to warrant a generalized medical model of all behavioral disorders or to imply that such problems exist within persons as do physical diseases." Robert Reid, John W. Maag, and Stanley F. Vasa, "Attention deficit hyperactivity disorder as a disability category: a critique," *Exceptional Children*, vol. 60, no. 3 (December 1993), p. 198 (citing T.M. Achenbach, "DSM–III in light of empirical research on the classification of child psychopathology," *Journal of the American Academy of Child Psychiatry*, vol. 19 (1980), pp. 395–412).

[205]"Behavioral Disorders: Focus on Change," ERIC Digest EDO–ED–93–1 (Reston, VA: Clearinghouse on Handicapped and Gifted Children, Council for Exceptional Children, 1993). Forness and Knitzer describe "conduct disorders" as "a specific psychiatric diagnosis in DSM–III–R" and "externalizing disorders" as "a term used by special educators to denote aggressive/disruptive behavior as opposed to internalizing disorders, that is, withdrawn/anxious behavior." Forness and Knitzer, "A New Proposed Definition and Terminology," p. 13 (citing Achenbach, *Assessment and taxonomy of child and adolescent psychopathology*.

[206]"Behavioral Disorders: Focus on Change," ERIC Digest.

[207]Ibid.

[208]Ibid.

[209]Gearheart, *Special Education for the '80s*, p. 292 (citing N. Lambert and E. Bower, "In-school screening of children with emotional handicaps" in N.J. Long, W.C. Morse, and R.G. Newman, eds., *Conflict in the classroom: The education of emotionally disturbed children* (Belmont, CA: Wadsworth Publishing Co., 1976)).

[210]Gearheart, *Special Education for the '80s* (St. Louis: The C.V. Mosby Co., 1980), p. 249 (citing H.R. Reinert, *Children in conflict: educational strategies for the emotionally disturbed and behaviorally disordered* (St. Louis: The C.V. Mosby Co., 1976), p. 6).

[211]Gearheart, *Special Education for the '80s*, p. 249 (citing W.C. Morse, "The educational of socially maladjusted and emotionally disturbed children," in W.M. Cruickshank and G.O. Johnson, eds., *Education of exceptional children and youth* (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1975), p. 556).

[212]Gearheart, *Special Education for the '80s*, p. 291.

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems."[213]

The term includes schizophrenia but does not apply to "children who are socially maladjusted, unless it is determined that they have a serious emotional disturbance."[214]

This Federal definition has received a great deal of criticism. There have been questions about the necessity of including the modifier "seriously" in the definition.[215] There have been criticisms that the five criteria for serious emotional disturbance are not supported by research on subtypes of children with emotional or behavioral disorders.[216] There also have been criticisms that the requirement of adverse educational performance is interpreted too narrowly "to mean just 'academic,' as opposed to 'social or behavioral,' performance."[217] There have been arguments that the five criteria[218] and four limiting conditions[219] are illogical when considered together.[220] Further, none of the five criteria and four limiting conditions has been defined by the IDEA.

A major criticism of the Federal definition has been over the exclusion of social maladjustment.[221] Those who seek the inclusion of social maladjustment in the definition point out that the original intent of Congress was to include social maladjustment in the definition of SED; therefore, exclusion works against that intent.[222] Further, they note that second criterion, an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, virtually defines social maladjustment such that exclusion is contradictory to the criteria used to define SED.[223] At least one State, California, has considered codifying social maladjustment and behavior disorders as separate categories

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[213]34 C.F.R. § 300.7(b)(9) (1995).

[214]*Id.* The National Mental Health and Special Education Coalition prefers the term "emotional or behavioral disorder" to serious emotional disturbance. *See* James M. Kauffman, John Wills Lloyd, John Baker, and Teresa M. Riedel, "Inclusion of all students with emotional or behavioral disabilities? Let's think again." *Phi Delta Kappan*, March 1995, p. 542, note 1 (citing Forness and Knitzer, "A New Proposed Definition and Terminology," pp. 12–20).

[215]*See* Forness and Knitzer, "A New Proposed Definition and Terminology," p. 12, and Steven R. Forness, "Legalism Versus Professionalism in Diagnosing SED in the Public Schools," *School Psychology Review*, vol. 21, no. 1 (1992), p. 31.

[216]Forness and Knitzer, "A New Proposed Definition and Terminology," p. 13 (citing H.C. Quay, W.C. Morse, and R.L. Cutler, "Personality patterns of pupils in special classes for the emotionally disturbed," *Exceptional Children*, vol. 32 (1966), pp. 297–301; and M. Rutter, "Isle of Wight revisited: Twenty-five years of child psychiatric epidemiology," *Journal of Child and Adolescent Psychiatry*, vol. 28 (1989), pp. 39–84)).

[217]Forness and Knitzer, "A New Proposed Definition and Terminology," p. 13.

[218]See text accompanying note 225.

[219]The four limiting conditions are (1) duration, "a long period of time"; (2) severity, "to a marked degree"; (3) adverse effect on educational performance; and (4) exclusion of social maladjustment unless serious emotional disturbance can also be determined. *See* 34 C.F.R. § 300.7(b)(9) (1995).

[220]Forness, "Legalism Versus Professionalism in Diagnosing SED," p. 30 ("Particularly when paired with one another, some of the five criteria and the four limiting conditions seem even more of a mistake than originally recognized."). Some argue that the traditional diagnostic distinctions in psychiatry "may be completely useless in terms of their correspondence with SED criteria." As a result, "School psychologists must wrestle with ethical dilemmas almost daily because their clinical judgment in these cases is at odds with their legal responsibility, especially when statutes are both logically and empirically unsupported." Ibid., p. 32.

[221]Ibid., p. 30 (citing E.M. Bower, "Defining emotional disturbance: Public policy and research," Psychology in the Schools, vol. 19 (1982), pp. 55–60; D.H. Cline, "A legal analysis for policy initiatives to exclude handicapped/disruptive students from special education," *Behavioral Disorders*, vol. 15, pp. 159–73; and R. Skiba and K. Grizzle, "The social maladjustment exclusion: Issues of definition and assessment," *School Psychology Review*, vol. 20 (1991), pp. 577–95). Forness argues that the exclusion of social maladjustment from the SED definition is that it forces the diagnostic process into an adversarial mode because parents will not feel free to divulge information to school personnel that would lead to a diagnosis of social maladjustment for fear of being misinterpreted, creating a stigma on their child, or being judged on their parenting skills. According to Forness, "the current definition and its social maladjustment exclusion seems to delay services to children and youth. . . [because] Much time is spent either trying to provide a child's or youth's difficulties are really social maladjustment or else trying to 'force' his or problems into an identifiable set of symptoms corresponding to one of the five SED criterion areas to override the social maladjustment facto. . . . Valuable time also is wasted, even after an initial prereferral, in an mistaken sense that early signs of behavioral or emotional problems do not really signify a *serious* emotional disturbance." Forness, "Legalism Versus Professionalism in Diagnosing SED," pp. 31–32.

[222]Forness and Knitzer, "A New Proposed Definition and Terminology," p. 13; and Forness, "Legalism Versus Professionalism in Diagnosing SED," p. 29. According to Forness and Knitzer, exclusion is problematic "since the five SED criteria in IDEA were taken from a study in which children were actually considered on the basis of their social and emotional problems in school." Forness and Knitzer, "A New Proposed Definition and Terminology," p. 13.

[223]Forness and Knitzer, "A New Proposed Definition and Terminology," p. 13, and Forness, "Legalism Versus Professionalism in Diagnosing SED," p. 29.

specifically excluded from the definition of serious emotional disturbance.[224]

In response to these criticisms of the Federal definition, there have been proposals for changing the definition of serious emotional disturbance to "emotional or behavior disorder." Under one proposed definition, the term emotional or behavioral disorder "means a disability characterized by behavioral or emotional responses in school so different from appropriate age, cultural, or ethnic norms that they adversely affect educational performance. Educational performance includes academic, social, vocational, and personal skills. Such as disability (A) is more than a temporary, expected response to stressful events in the environment; (B) is consistently exhibited in two different settings, at least, one of which is school-related; and (C) is unresponsive to direct intervention in general education or the child's condition is such that general education interventions would be insufficient." In addition, that definition specifies that emotional and behavioral disabilities can coexist with other disabilities, and it may include children or youth with schizophrenic disorders, affective disorders, anxiety disorders, or other sustained disorders of conduct or adjustment when they adversely affect educational performance.[225] One reason why emotional and behavior disorders are included together is to acknowledge that behavioral manifestations of underlying emotional states can occur, particularly as early symptoms of severe disorders.[226] Despite the disagreements in terminology and definition, there is considerable agreement about general patterns or types of behavior characterizing students with emotional disturbance. Some students with emotional disturbance may be aggressive and disruptive, and they may act out.[227] Others are withdrawn, anxious, and depressed.[228]

Students identified with disabilities can be educated in a wide variety of settings besides the regular classroom, such as a "resource room," residential facility, and several additional settings.[229] Some of the learning environments involve multiple classrooms and/or schools. In addition, students with disabilities can have changes in their educational setting, if they need a more or less restrictive environment.

Beneficiaries of Special Education Services

The IDEA provides some funding to States and local school districts for special programs and services for disabled children and youth.[230] The part B program of IDEA distributes funds to the States according to the total number of students with disabilities aged 3 to 21 reported by the States as receiving special education and related services. Each State educational agency (SEA) conducts an annual child count on December 1 of each year and submits it to OSEP. The State's part B grant for the following fiscal year is based on that count. Although States must serve all eligible children with disabilities, in general funds are provided only for up to 12 percent of the State's total school-age population.[231]

Since the enactment of the IDEA in 1975,[232] the total number of students participating in the Nation's programs for children with disabilities has increased each year, despite an overall decline in K–12 enrollment (particularly in the late 1970s and mid-1980s). In the 1992–1993 school year, 5.1 million students under age 21 were served in federally supported programs for the disabled, up from 3.7 million in 1976–1977.[233] During

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[224]Forness, "Legalism Versus Professionalism in Diagnosing SED," p. 33 (citing California State Department of Education, *California programs and services for students with serious emotional disturbances* (Sacramento: Author, 1991)).

[225]Forness and Knitzer, "A New Proposed Definition and Terminology," p. 13.

[226]Ibid., p. 14.

[227]Achenbach refers to these individuals as "externalizers." Quay identifies these qualities as one of four dimensions, and this dimension is the conduct disorder. "Emotional Disturbances," ERIC Digest E454 (Reston, VA: Clearinghouse on Handicapped and Gifted Children, Council for Exceptional Children, 1988) (citing T.M. Achenbach, *Developmental psychopathology* (New York: John Wiley & Sons, 1982); and H.C. Quay, "Patterns of aggression, withdrawal, and immaturity" in H.C. Quay and J.S. Werry, eds., *Psychopathological disorders of childhood* (New York: John Wiley & Sons, 1972)).

[228]Achenbach refers to these individuals as "internalizers." Quay identifies these qualities as one of four dimensions, and this dimension is the personality disorder. "Emotional Disturbances," ERIC Digest E454 (citing Achenbach, *Developmental psychopathology*, and Quay, "Patterns of aggression, withdrawal, and immaturity").

[229]Educational placement settings for students with disabilities are explained below.

[230]Jeannie Oakes and Martin Lipton, *Making the Best of Schools* (New Haven, Connecticut: Yale University Press, 1990), p. 187 (hereafter cited as Oakes and Lipton, *Schools*).

[231]U.S. Department of Education, *To Assure the Free Appropriate Education of All Children with Disabilities: Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, D.C., 1995), pp. 2–3 (hereafter cited as DOEd, *1995 IDEA Report*).

[232]IDEA was previously enacted as the Education for All Children Act of 1975, Pub. L. No. 94–142 (codified as amended in 20 U.S.C. § 1400 (1988)).

[233]DOEd, *Digest 1995*, p. 65.

the intervening years, the number of beneficiaries rose steadily.[234]

Students with learning disabilities are the "fastest growing" group of disabled students being served by federally aided special education programs. In 1993-1994, 2.4 million children and youth from birth to age 21 with a specific learning disability received special education and related services, up from 2.0 million students in the 1989–1990 school year, 1.6 million in 1981–1982, and fewer than 0.8 million in 1976–1977.[235]

Also, the representation of students classified as mentally retarded in federally supported special education programs is declining rapidly. In 1992–1993, slightly more than 500,000 students who had disabilities ranging from as profound as requiring life support care to educable mental retardation were served (under the overall heading "mental retardation," down from 643,000 in 1986–1987 and almost 1 million students in 1976–1977.[236]

The number of students with serious emotional disturbance rose modestly during the 17-year period, from 283,000 in 1976–1977 to 350,000 in 1982–1983, to slightly more than 400,000 10 years later.[237] There is some evidence that students with serious emotional disturbance could be underidentified.[238] Possible reasons for the underidentification include: reluctance, by both parents and professionals, to use the serious emotional disturbance label because it often is viewed pejoratively and certain characteristics of SED (e.g., withdrawal, depression) may be overlooked in school settings.[239]

[234]Ibid. *See* table 4.8.
[235]Ibid.
[236]DOEd, *Education 1996*, table 423-1, p. 272. *See* table 4.8.
[237]Ibid.
[238]U.S. Department of Education, *To Assure the Free Appropriate Education of All Children with Disabilities: Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, D.C., 1992), p. 10 (hereafter cited as DOEd, *1992 IDEA Report*).
[239]Ibid.

Number of Students with Disabilities Served as Percentage of Total Public School Enrollment[240]

In the 1992–1993 school year, students with disabilities accounted for 12 percent of all K–12 students in the Nation's public schools, up from 11 percent in 1984–1985 and 8 percent in 1976–1977.[241] Similar changes took place as students with specific disabilities were identified. For instance, between 1976 and 1993, as more students with learning disabilities were identified and served by special education services (an overall threefold increase during the 18-year period), their representation among all K–12 public school students increased from 1.8 percent (in 1976–1977) to 5.5 percent.[242] Also, the decrease (by almost 50 percent) in the number of mentally retarded students identified and served in the public school system during the same period resulted in their declining share in the total K–12 enrollment—from 2 to 1 percent.[243] Although the representation of SED students among all publicly educated elementary and secondary students rose during the 18-year period, it remains below 1 percent of all students served in special education programs.[244]

Percentage Distribution of Students with Disabilities Who Participate in Special Education

The percentage of disabled students served by part B of IDEA due to being identified as having specific learning disabilities more than doubled between 1977 (22 percent of disabled students) and 1993 (46 percent)—an increase of 24 percentage points, which exceeded that of any other disability type.[245] By 1994 students with learning disabilities accounted for more than 50 percent of all students with disabilities.[246]

One explanation for this increase is that since the field of learning disabilities is relatively new, with each

[240]The data presented in this section are calculated as the number of children and youth with disabilities between birth and age 21 who receive federally supported services as a percentage of the estimated public school enrollment in pre-K through grade 12. Other sources use the number of children with disabilities between the ages of 6 and 17 when comparing the number of children with disabilities to public school enrollment. *See*, for instance, DOEd, *1995 IDEA Report*, table AA16, p. A-36. Because the 6-17 age group is more restrictive than the birth-to-age 21 age group, using this age group yields a small figure for the proportion of students being served in special education.
[241]DOEd, *Digest 1995*, p. 65. *See* table 4.9.
[242]Ibid. *See* table 4.9.
[243]Ibid.
[244]Ibid. *See* table 4.9.
[245]DOEd, *Education 1995*, p. 345. *See* table 4.10.
[246]DOEd, *1995 IDEA Report*, p. 12.

TABLE 4.8

Number of Children and Youth from Birth through Age 21 with Disabilities Served in Federally Supported Programs, by Type of Disability: 1976-1977 to 1992-1993

Numbers served in thousands

	All disabilities	Specific learning disabilities	Serious emotional disturbance	Mental retardation
1976-1977	3,692	796	283	959
1980-1981	4,412	1,462	346	829
1981-1982	4,198	1,622	339	786
1982-1983	4,255	1,741	352	757
1983-1984	4,298	1,806	361	727
1984-1985	4,315	1,832	372	694
1985-1986	4,317	1,862	375	660
1986-1987	4,374	1,914	383	643
1987-1988	4,447	1,928	373	582
1988-1989	4,544	1,987	376	564
1989-1990	4,641	2,050	381	548
1990-1991	4,762	2,130	390	534
1991-1992	4,949	2,234	399	538
1992-1993	5,125	2,354	401	519

Source: U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1996*, by Thomas Smith et al. (Washington, D.C.: Government Printing Office, October 1996), table 43-1, p. 272.

[1] Before 1987-1988, students classified as "preschool disabled" were included in the reported counts of children served in federally supported programs, by disabling condition. Therefore, between 1976-1977 and 1986-1987, the reported number of children with each specific disability was based on the number between the ages of 0 and 21. Starting in 1987-1988, States no longer were required to report the number of preschool (ages 0 to 5) children by disabling condition. Instead, the disabilities of children between birth and age 5 are counted under the one category "preschool disabled." Therefore, as of 1987-1988, the reported number of students with a particular disability only includes children between the ages of 5 and 21.

TABLE 4.9

Children and Youth from Birth through Age 21 with Disabilities Served in Federally Supported Programs, by Type of Disability: 1976-1977 to 1992-1993

Number served as percentage of total enrollment[2]

	All disabilities	Specific learning disabilities	Serious emotional disturbance	Mental retardation
1976–1977	8.33	1.80	0.64	2.16
1980–1981	10.13	3.58	0.85	2.03
1981–1982	10.47	4.05	0.85	1.96
1982–1983	10.75	4.40	0.89	1.91
1983–1984	10.95	4.60	0.92	1.85
1984–1985	11.00	4.67	0.95	1.77
1985–1986	10.95	4.72	0.95	1.68
1986–1987	11.00	4.81	0.96	1.62
1987–1988	11.11	4.82	0.93	1.45
1988–1989	11.30	4.94	0.94	1.40
1989–1990	11.44	5.06	0.94	1.35
1990–1991	11.55	5.17	0.95	1.30
1991–1992	11.77	5.31	0.95	1.28
1992–1993	11.97	5.50	0.94	1.21
1993–1994	11.79	5.62	0.95	1.27

Source: U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics*, by Thomas Snyder et al. (Washington, D.C.: Government Printing Office, October 1995), table 51, p. 65, and table 3, p. 12; U.S. Department of Education, *The Condition of Education 1966*, by Thomas Simth et al. (Washington, D.C.: Government Printing Office, June 1996), table 43-1, p. 272.

[1] Before 1987–1988, students classified as "preschool disabled" were included in the reported counts of children served in federally supported programs, by disabling condition. Therefore, between 1976–1977 and 1986–1987, the reported number of children with each specific disability was based on the number between the ages of 0 and 21. Starting in 1987–1988, States no longer were required to report the number of preschool (ages 0 to 5) children by disabling condition. Instead, the disabilities of children between birth and age 5 are counted under the one category "preschool disabled." Therefore, as of 1987–1988, the reported number of students with a particular disability only includes children between the ages of 5 and 21.

[2] Based on enrollment in public schools, kindergarten through 12th grade, including a relatively small number of prekindergarten students.

TABLE 4.10
Children and Youth from Birth through Age 21 with Disabilities Served in Federally Supported Programs, by Type of Disability: 1976–1977 to 1992–1993

Percentage distribution of children served

	All disabilities	Specific learning disabilities	Serious emotional disturbance	Mental retardation	Other disabilities
1976–1977	100.0	21.6	7.7	26.0	44.7
1978–1979	100.0	35.3	8.4	20.0	36.3
1981–1982	100.0	38.6	8.1	18.7	34.6
1982–1983	100.0	40.9	8.3	17.8	33.0
1983–1984	100.0	42.0	8.4	16.9	32.7
1984–1985	100.0	42.4	8.6	16.1	32.9
1985–1986	100.0	43.1	8.7	15.3	32.9
1986–1987	100.0	43.8	8.8	14.7	32.7
1987–1988	100.0	43.4	8.4	13.1	35.1
1988–1989	100.0	43.6	8.3	12.7	35.4
1989–1990	100.0	44.2	8.2	11.8	35.8
1990–1991	100.0	44.7	8.2	11.2	35.9
1991–1992	100.0	45.1	8.1	10.9	35.9
1992–1993	100.0	45.9	7.8	10.1	36.2
1993–1994	100.0	45.5	7.8	20.3	36.4

Source: U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1996*, by Thomas Smith et al. (Washington, D.C.: Government Printing Office, June 1996), table 43-1, p. 272.

[1] Before 1987–1988, students classified as "preschool disabled" were included in the reported counts of children served in federally supported programs, by disabling condition. Therefore, between 1976–1977 and 1986–1987, the reported number of children with each specific disability was based on the number between the ages of 0 and 21. Starting in 1987–1988, States no longer were required to report the number of preschool (ages 0 to 5) children by disabling condition. Instead, the disabilities of children between birth and age 5 are counted under the one category "preschool disabled." Therefore, as of 1987–1988, the reported number of students with a particular disability only includes children between the ages of 5 and 21.

successive year school personnel and parents become more adept at recognizing children with specific learning disabilities.[247] An additional explanation is that within the past two decades, there have been various changes in the social and cultural structure of the Nation, increased levels of poverty and substance abuse among pregnant women, along with diminishing social support systems—all of which can cause the increased prevalence of specific learning disabilities.[248]

The proportion of students with disabilities classified as mentally retarded fell 16 percentage points, from 26 to 10 percent, while the representation of students identified as having serious emotional disturbances/behavioral disorders among other students with disabilities remained virtually unchanged during the 17-year period at 8 percent.[249]

State Comparison of Served Special Education Students

In 1993–1994, the percentage of all publicly educated students who had Individualized Educational Programs (IEPs) varied by State, ranging from fewer than 8 percent in Hawaii, Illinois, and New Jersey, to above 15 percent in Indiana, Massachusetts, North Carolina, and Rhode Island.[250] The number of students with specific types of disabilities also varied by State. In Texas, for instance, 222,000 students with learning disabilities between the ages of 6 and 21 were served under IDEA, part B, in 1993–1994, up from fewer than 50,000 in 1976–1977, more than a fourfold increase.[251] In Mississippi, 31,000 students with learning disabilities were served in 1993–1994, up by more than 1000 percent from 1976–1977 when only 2,728 students were served.[252]

The number of students identified as being mentally retarded and served in special education programs has decreased considerably in certain States since the inception of IDEA provisions. For instance, in Pennsylvania, 24,000 students with mental retardation were served by federally funded programs in 1993–1994, down from almost 50,000 in 1976–1977.[253] During the same time period, the number of beneficiaries classified as having mental retardation in New York decreased from 45,000 to 17,000.

Students with serious emotional disturbance or behavioral disorders increased sharply, particularly in States with fewer than 5,000 beneficiaries (in 1976–1977). For instance, in Minnesota, between 1976–1977 and 1993–1994, the number of students with serious emotional disturbance/behavioral disorders who received services under IDEA, part B, increased from 4,237 to 15,157.[254] In contrast, in Illinois, fewer recipients of special education services had serious emotional disturbance in 1993–1994 (13,949) than in 1976–1977 (24,803).[255]

Racial/Ethnic Characteristics of Students Identified with Specified Disabilities

Based on OCR's 1992 Civil Rights Survey,[256] 4.5 million students (or 11 percent of the 42.3 million students in public elementary and secondary schools) were enrolled in federally sponsored special education programs.[257] The representation of various racial/ethnic groups among students with specific disabilities is different from their representation in the student population at large. Blacks were overrepresented among students with specific disabilities, while Hispanics and Asian Americans were underrepresented.[258] Of all students enrolled in public schools, 67 percent of students were white; 16 percent were black; 11 percent were Hispanic; 3 percent were Asian American; and 1 percent were Native American.[259]

The representation of various racial/ethnic minorities varies across disabilities:

- Blacks are overrepresented and whites are underrepresented among students who have mild

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[247]Ibid., p. 13.
[248]Ibid.
[249]DOEd, *Education 1995*, p. 345.
[250]DOEd, *Overview*, p. 3.
[251]DOEd, *1995 IDEA Report*, p. A–18.
[252]Ibid.
[253]Ibid., p. A–20.
[254]Ibid., p. A–21.
[255]Ibid.
[256] The most recent year of gender and racial/ethnic profiles of students with disabilities is 1992.
[257]U.S. Department of Education, Office for Civil Rights, *National Summaries from the Elementary and Secondary Civil Rights* Survey (Washington, DC: 1992) (hereafter cited as OCR, *1992 National Summary*). *See* table 4.11.
[258] Data from years before 1992 also indicate that the representation of various racial/ethnic groups among students with disabilities is different from their representation in the entire student population. For instance, in 1990, of the 3.87 million students enrolled in federally sponsored special education programs, 68 percent were white and 19 percent were black; yet whites and blacks accounted for about 68 and 16 percent, respectively, of all students enrolled in public schools. Hispanics and Asian Americans, who represented about 12 percent and 3 percent of total enrollment, respectively, accounted for 10 and 1.3 percent of all students served in special education programs. *See* DOEd, 1994 *IDEA Report*, p. 202; and DOEd, *Digest of Education Statistics 1995*, p. 60.
[259]OCR, *1992 National Summary*. *See* table 4.12. Percentages may not add up to 100 due to rounding and to students from other racial/ethnic groups not included in this analysis.

TABLE 4.11
Estimated Enrollment of Elementary and Secondary Students with Disabilities, by Selected Disability, Race/Ethnicity, and Gender: 1992

	Specific learning disabilities			Serious emotional disturbance			Mild retardation[1]		
	Total	Males	Females	Total	Males	Females	Total	Males	Females
White	1,524,156	1,065,565	458,591	199,187	159,229	39,958	212,585	123,334	89,251
Black	398,859	277,772	121,087	70,087	55,983	14,104	112,052	68,029	44,022
Hispanic	262,344	177,465	84,879	20,407	16,406	4,001	18,513	10,655	7,858
Asian Amer.	24,747	17,232	7,515	2,016	1,534	482	3,075	1,640	1,436
Native Amer.	29,876	20,348	9,528	3,829	2,936	893	4,181	2,337	1,844
Total	2,239,982	1,558,382	681,600	295,526	236,088	59,438	350,406	205,995	144,411

Source: U.S. Department of Education, Office for Civil Rights, National Summaries from the Elementary and Secondary Civil Rights Survey (Washington, D.C., 1992). As of the 1987-1988 school year, States were no longer required to report preschoolers (aged 0 to 5) by disabling condition.

[1] The term "mild retardation" is considered parallel to the term from the classification system used in public education: "educable mental retardation." *See* discussion in this section.

TABLE 4.12
Elementary and Secondary Students with Disabilities, by Selected Disability, Race/Ethnicity, and Gender: 1992

	Specific learning disabilities			Serious emotional disturbance			Mild retardation		
	Total	Males	Females	Total	Males	Females	Total	Males	Females
White	68.1	68.4	67.3	67.4	67.4	67.2	60.7	59.7	61.8
Black	17.8	17.8	17.7	23.7	23.7	23.7	32.0	33.0	30.6
Hispanic	11.7	11.4	12.5	6.9	7.0	6.8	5.3	5.3	5.4
Asian Amer.	1.0	1.0	1.1	0.7	0.7	0.8	0.9	0.9	1.0
Native Amer.	1.4	1.4	1.4	1.3	1.2	1.5	1.1	1.1	1.2
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Source: U.S. Department of Education, Office for Civil Rights, National Summaries from the Elementary and Secondary Civil Rights Survey (Washington, D.C., 1992).

As of the 1987-1988 school year, States were no longer required to report preschoolers (aged 0 to 5) by disabling condition.

retardation.[260] In 1992, of students with mild retardation, blacks accounted for 32 percent of the population of students served, while whites comprised 61 percent. Hispanics and Asians combined were about 8 percent[261] of students identified with this particular disability and served in special education.[262]

• Similarly, of students with serious emotional disturbance, 71 percent were white and 22 percent were black. Again, Hispanics and Asians were underrepresented and when combined accounted for fewer than 7 percent of students served in special education for SED.[263]

• Of all served students in special education who had a specific learning disability, 70 percent were white, while 17 percent were black.[264] Of the disabilities addressed, both Hispanics and Asians had their highest representation (12 percent combined) among special education students identified as having learning disabilities.[265]

The overrepresentation of blacks in special education classes (especially for those identified as educable mentally retarded) is considered by the educational community as a pressing issue, partially because of society's concern with equality of opportunity and equity of treatment.[266]

Gender Differences of Secondary School Youth Identified with Specific Disabilities

Based on OCR's 1992 Civil Rights Survey, the representation of males and females among all students identified as having a disability varies across the three disabilities addressed in this report. In 1992, as in previous years, males were overrepresented in certain disabilities. In addition, data from years before 1992 indicate that secondary school-age males are overrepresented among students with disabilities in general.[267] Because there is prior evidence documenting males' disproportionate share of students with disabilities, it is likely that in 1992, more than 51 percent of public school students (i.e., males' share of total public school enrollment[268]) with disabilities are male. Conversely, in 1992, females' representation among public school students with disabilities likely is less than their share of total public school enrollment (49 percent).[269] The overrepresentation of males among public school students with disabilities is in large part a function of the high disproportion of males in the high-incidence disabilities—such as specified learning disabilities (73.4 percent male) and serious emotional disturbance (76.4 percent—the highest proportion of males to females in any of the disability categories).[270] High disproportion of males also is fairly pronounced

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[260] The term "mild retardation" is considered parallel to the term from the classification system used in public education: "educable mental retardation."

[261] For any of the specific disabilities addressed, percentages will not add to 100 percent since additional racial/ethnic groups (e.g., Native Americans) may be represented in the particular disability group, although data are not provided on them.

[262] *See* table 4.12.

[263] Ibid.

[264] Ibid.

[265] Ibid.

[266] Kirby Heller et al., eds. *Placing Children in Special Education: A Strategy for Equity* (Washington, D.C.: National Academy Press, 1982), pp. 3, 18, and 20 (hereafter cited as Heller, *Placement*). There is a similar concern about the validity of the assessment procedures used to place students in special education. If children are systematically assigned to educable mentally retarded classes when other settings would be more appropriate or beneficial, then the assessment system for special education is of questionable validity, either for students in general or for particular subgroups that are overidentified. If the assessment system results in disproportions for particular subgroups, the assessments may still be valid and defended if their educational usefulness and relevance can be demonstrated. Furthermore, disproportion can be a problem if children are unduly exposed to the likelihood of an educable mentally retarded placement by being in schools or classes with poor quality of regular education instruction. Students are referred for special education assessment typically after they have experienced some academic difficulties. However, children whose regular classroom instruction is poor may experience a lack of progress at a higher rate than they would if the instruction were better (assuming that quality instruction is unequally distributed). Since assessment instruments typically measure the outcomes of learning rather than the learning process, it is possible that the students who have not learned because of poor instruction will be judged as having learning difficulties from any instruction. In addition, disproportion can be a problem if the quality and academic relevance of instructions in special education classes blocks the student's educational progress and hinders the likelihood of their return to placement classes.

[267] DOEd, *1992 IDEA Report*, p. 11. Data from years before 1992 reveal that the representation of males among students with disabilities is higher than their representation in public school enrollment. For instance, in 1987, a demographic profile of secondary school-age youth (from ages 13 to 21 years old) with disabilities was constructed from a nationally represented sample of students. The data showed that the percentage of youth without disabilities who are male was slightly less than 50 percent; yet almost 70 percent of all secondary students with disabilities were male. Specifically, males accounted for 73 percent of students with learning disabilities and 76 percent of students (the highest proportion of males to females in any of the disability categories) with serious emotional disturbance. High disproportion of males was also fairly pronounced among those classified as mentally retarded (58 percent male). *See* ibid.

[268] Ibid.

[269] Ibid.

[270] Ibid.

among those classified as mentally retarded (58 percent male).[271]

Educational Placement Settings and Supplementary Services Provided to Students with Disabilities

Educational Placement Settings for Students with Disabilities

Many aspects of schools affect youth receiving special education, including where the instruction is received (e.g., regular or special classes), what supports they receive in the classroom, and what type of school they attend (regular or special).[272] Students with disabilities are educated in six possible environments, ranging from a regular class, to a resource room, to a separate class in a regular school, to the most restrictive environment: homebound/hospital care.[273] The IDEA, part B, and its implementing regulations require that "to the maximum extent appropriate, children with disabilities, including those who are educated in public and private institutions and other care facilities, should be educated with children who are not disabled."[274] Special education classes, separate schooling, or other removal of children with disabilities from the regular education environment are intended to occur only when the nature and severity is such that education in regular classes with the use of supplementary services and aides cannot be achieved satisfactorily.[275]

The regulations further stipulate that "a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services."[276] Of the six types of educational settings available to students who have an identified disability and are entitled to the provisions of IDEA, the appropriate learning environment(s), along with additional related services and curriculum needs, are delineated in each student's Individual Education Program. The settings are, in order of least to most restrictive:

- *Regular class*, which includes students who receive the majority (at least 80 percent) of their education program in a regular classroom and receive special education and related services outside the regular classroom.[277]
- *Resource room* includes students who receive special education and related services outside the regular classroom for at least one-fifth but not more than 60 percent of the school day.[278]
- *Separate class* includes students who receive special education and related services outside the regular classroom for at least 60 percent of the school day. Students may be placed in self-contained special classrooms with part-time instruction in regular classes or placed in self-contained classes full-time on a regular school campus.[279]
- *Separate school* includes students who receive special education and related services in separate day schools for at least one-half the school day.[280]
- In 1993–1994, the predominant function of more than 1,600 public schools was to provide special education[281] for 217,000 disabled students only.[282] Illinois had 237 such schools (6 percent of all its public schools) enrolling 1.2 percent of publicly educated students.[283] Two percent of California's and New York's public schools were geared to special education (136 and 83 facilities, respectively).[284]
- *Residential facility* includes students who receive education in a public or private residential facility (at public expense) for at least one-half of the school day.[285]
- According to DOEd, various problems are associated with restrictive placements.[286] Frequently, the distance between the home community and the residential site makes it difficult to monitor students' progress. In addition, there can be little continuity in school programming, and often the

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[271]DOEd, *1992 IDEA Report*, pp. 11 and 113. Although there is some evidence that reading disabilities are more likely in males than females, there also is evidence from studies in other countries which does not show such disproportion. Some researchers explain male overrepresentation as students with serious emotional disturbance as being due to teachers and other school personnel being more likely to perceive boys than girls as troublesome and emotionally disturbed.

[272]DOEd, *1995 IDEA Report*, p. 75.

[273]Ibid., p. 13.

[274]34 C.F.R. § 300.550 (1995).

[275]*Id.*

[276]*Id.*

[277]DOEd, *1995 IDEA Report*, p. 13.

[278]Ibid., p. 13.

[279]Ibid., p. 14.

[280]DOEd, *1995 IDEA Report*, p. 14.

[281]A special education school focuses primarily on special education, with materials and instructional approaches adapted to meet the students' needs. *See* DOEd, *Overview*, p. 4.

[282]DOEd, *Overview*, p. 1. Most recent data on numbers of special education schools by State are from the 1993–1994 school year.

[283]DOEd, *Overview*, table 1.

[284]Ibid.

[285]DOEd, *1995 IDEA Report*, p. 14.

[286]DOEd, *1994 IDEA Report*, p. 116.

student's public school remains only minimally involved in the ongoing assessment of progress.[287]

- *Homebound/hospital environment* includes students placed in and receiving special education in hospital or homebound programs.[288]

Special Education in the Context of the Regular Education Environment

In 1993–1994, approximately 98 percent of students attending public schools (40 million) were enrolled in the Nation's 80,000 regular schools.[289] Many of these facilities do *not* restrict themselves to the provision of regular education classes, but often provide a range of special education programs (in addition to vocational and/or alternative programs) in addition to their traditional curriculum offerings.[290] The types of education facilities available vary by State. For instance, North Dakota and New Hampshire serve all of their public school pupils in regular schools, and therefore have no separate public school for students with disabilities, students interested in vocational education, or those in need of a nontraditional school setting.[291] In contrast, Delaware has the largest proportion of students in nonregular schools, which served almost 8 percent of the State's publicly educated students.[292]

In the past, some members of the education community assumed a correlation between the intensity of the special education services provided and the restrictiveness of the educational placement.[293] That is, it was assumed that students in separate classes generally received a greater number of hours of special education per day or week, for instance, and had a smaller pupil-teacher ratio than did their peers in regular class or resource room placements.[294] However, since efforts to serve students in regular classroom and resource room settings have increased, and many local school districts are providing intensive special education services within regular classroom settings, this assumption may no longer be valid.[295]

Summary of Educational Placements of All Students with Disabilities: 1989–1990 to 1992–1993

In 1992–1993,[296] 40 percent of all students with disabilities between the ages of 6 and 21 were served in regular education settings, up from 32 percent in 1989–1990.[297] About 31 percent of students with disabilities were educated in the "resource room" setting, down from 38 percent in 1989–1990.[298] Approximately 24 percent of students with disabilities were served in a separate class in a regular school building, which was virtually the service level 3 years earlier.[299]

Placements in the three most restrictive settings (i.e., separate school, residential facility, and hospital/homebound) remained relatively stable as well between 1988–1989 and 1992–1993, and in 1992–1993, fully 95 percent of students with disabilities continued to be served in regular school buildings. Of the 5 percent in separate facilities, 3.7 percent were served in separate day schools, 0.8 percent were in residential facilities, and the remaining 0.5 percent were homebound.[300]

Summary of Educational Placement Patterns of Students with Specific Disabilities: 1989–1990 to 1992–1993

Students' educational placements vary considerably, and the variations are related to the nature of the students' disabilities.[301] According to DOEd, as a rule, students with disabilities who tend to require more specialized educational programming are served in more restrictive placements, such as separate classes.[302] Students with mild learning disabilities are served more often in regular classes and resource room placements.[303] Overall, students with less significant disabilities spend more time in regular education.[304]

In any of the years between 1989–1990 and 1992–1993, a greater proportion of students with learning disabilities were served in regular classes than were their peers with serious emotional disturbance or those classified as mentally retarded. The resource room was the most common educational setting for students with

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[287]Ibid.
[288]DOEd, *1995 IDEA Report*, p. 14.
[289]DOEd, *Overview*, p. 1 and table 1.
[290]Ibid, p. 1.
[291]Ibid., table 1. The most recent available data on individual States' specialty schools are from the 1993–1994 school year.
[292]Ibid., table 1.
[293]DOEd, *1994 IDEA Report*, p. 15.
[294]Ibid., p. 15.
[295]Ibid.

[296]The most recent data on placement of students (in education settings) with disabilities are for 1992–1993.
[297]DOEd, *1995 IDEA Report*, pp. 14–15.
[298]Ibid. *See* table 4.13.
[299]Ibid., pp. 14–15.
[300]Ibid. *See* table 4.13.
[301]DOEd, *1994 IDEA Report*, p. 13.
[302]Ibid., p. 13.
[303]Ibid., p. 13.
[304]DOEd, *1995 IDEA Report*, p. xxiii.

TABLE 4-13
Percentage of Students with Disabilities Aged 6-21 Served in Different Educational Environments by Disability: School Years 1989-1990 to 1992-1993

	Educational environment					
	Regular class	**Resource room**	**Separate class**	**Separate school**	**Residential facility**	**Hospital/ homebound**
1989–1990						
All disabilities	31.5	37.6	24.9	4.6	0.9	0.6
L.D.	20.7	56.1	21.7	1.3	0.1	0.1
M.R.	6.7	20.1	61.1	10.3	1.4	0.4
S.E.D.	14.9	28.5	37.1	13.9	3.6	2.0
1990–1991						
All disabilities	34.0	34.5	25.2	4.9	0.8	0.6
L.D.	22.6	53.5	22.4	1.0	0.2	0.2
M.R.	7.6	22.6	58.5	9.9	1.1	0.4
S.E.D.	16.8	29.1	35.7	13.4	3.5	1.4
1991–1992						
All disabilities	34.9	36.3	23.5	3.9	0.9	0.5
L.D.	24.7	54.2	20.0	0.9	0.1	0.1
M.R.	5.1	25.4	59.2	8.8	1.2	0.3
S.E.D.	15.8	27.8	36.9	13.9	4.0	1.5
1992–1993						
All disabilities	39.8	31.7	23.5	3.7	0.8	0.5
L.D.	34.8	43.9	20.1	0.8	0.2	0.2
M.R.	7.1	26.8	56.8	7.9	0.9	0.5
S.E.D.	19.6	26.7	35.2	13.7	3.5	1.3

Sources: U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children with Disabilities: Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, D.C., 1992), p. 25; U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics 1994*, by Thomas Snyder et al. (Washington, D.C.: Government Printing Office, October 1994), p. 66; U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children with Disabilities: Sixteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, D.C., 1994), p. 14; and U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children with Disabilities: Seventeenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, D.C., 1995), p. 17.

Disability abbreviations:
L.D.—Specific learning disabilities
M.R.—Mental retardation
S.E.D.—Serious emotional disturbance

learning disabilities during this 4-year period.[305] However, during each successive year in the 1990s, fewer students with learning disabilities were placed in the resource room, as a greater percentage were educated in the less restrictive regular class.[306] For instance, in 1992–1993, 44 percent of students were placed in the resource room, down from 56 percent in the "base year," while 35 percent were educated within the regular class in 1992–1993, compared to 21 percent in 1989–1990. As a result, students with learning disabilities are becoming even more integrated in a regular learning environment.

Students with serious emotional disturbance (SED), as a group, are less integrated into regular classroom settings. The three most restrictive environments, all of which were separate facilities from the regular school, were more common placements for students with serious emotional disturbance than for their peers with learning disabilities and students classified as mentally retarded.[307] Between 1989–1990 and 1992–1993, about one-fifth of students identified as having serious emotional disturbance received their education in separate schools and facilities.[308]

However, for students with serious emotional disturbance, separate classes within a regular school were the most common education environment (serving 35 to 37 percent of students with SED between 1988–1989 and 1992–1993) during the 4-year period.[309] Moreover, although students with SED were more likely than their peers classified as mentally retarded to be served in separate facilities (the most restrictive settings), they also were more likely to be placed in the regular classroom (the least restrictive educational setting).[310] In 1992–1993, for instance, 20 percent of students with SED, compared to 7 percent of their peers classified as mentally retarded, were placed in a regular class.[311] According to DOEd, perceptions of school personnel that the behavior problems of students with SED are difficult to accommodate in regular classes could impede increased integration.[312]

Similar to students with SED, students classified as mentally retarded continued to be educated primarily in separate classes, with resource rooms as the second most common setting.[313] However, movement during the 4-year period towards less restrictive environments was reflected in fewer placements in separate classes of students classified as mentally retarded in 1992–1993 (57 percent) than in 1989–1990 (61 percent), and more placements in the resource room in 1992–1993 (27 percent) compared to 1989–1990 (20 percent).[314] Also during the 4-year period, about 10 percent of students classified as mentally retarded received their education on premises separate from the regular school building.[315] In addition, in any given year, the smallest percentage of students with disabilities (for any category, except students with multiple disabilities) served in the regular classroom was among those classified as mentally retarded.[316]

Educational and Support Services for Secondary School Students with Disabilities

Data collected by DOEd in the early 1990s (on an ongoing basis) revealed that more than 60 percent of secondary school students with disabilities, on average, were enrolled in some form of vocational education during their "most recent school year,"[317] and special education students received an average of 5 hours per week of instruction in this area.[318] Of those enrolled in vocational courses, approximately one-half complete occupationally oriented courses, while the other half had either home economics-oriented courses, work exploration, or on-the-job training.[319]

In addition, students with disabilities receive a variety of related services in order to meet the educational needs stemming from a disability.[320] Some of the services at the secondary school level are intended to prepare youths to transition to adulthood.[321] More than 50 percent of all secondary students with disabilities received job training during the most recent school year; more than 25 percent received occupational therapy/life skills training; and about 16 percent received personal counseling/therapy.[322]

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[305] *See* table 4.13.
[306] *See* table 4.13.
[307] *See* table 4.13.
[308] DOEd, *1993–1994 Biennial Report*, p. 315–2. Compared to all students with disabilities, the families of students with serious emotional disturbance are more likely to make large financial sacrifices to secure services for their children.
[309] *See* table 4.13.
[310] *See* table 4.13.
[311] *See* table 4.13.
[312] DOEd, *1992 IDEA Report*, p. 28.
[313] *See* table 4.13.
[314] *See* table 4.13.
[315] *See* table 4.13.
[316] *See* table 4.13.
[317] The concept "most recent school year" was not defined, since the DOEd report did not state the specific year(s) in which the data were collected from/about the students.
[318] DOEd, *1995 IDEA Report*, p. 159.
[319] Ibid.
[320] Ibid., p. 157.
[321] Ibid., p. 156.
[322] Ibid., pp. 157–58.

Personnel Employed to Serve Students with Disabilities in the Nation's Public Schools

To ensure that all students with disabilities have access to a free appropriate education, there must be an adequate supply of personnel with appropriate training or certification, including teachers, diagnostic staff, related services personnel, and other instructional and noninstructional staff.[323] Below is an assessment of the number of total special education teachers who instruct students with all disabilities and those who educate students with specific learning disabilities, serious emotional disturbance, and students classified as mentally retarded. The number and distribution of students with each specific disability category creates a demand for a specific number of special education teachers who possess a particular set of credentials (e.g., certification level and disability specialty, extent of experience educating students with particular disabilities).

In the 1992–1993 school year,[324] 311,201 special education teachers (FTE)[325] served 4.63 million students between the ages of 6 and 21.[326] In the previous year, slightly fewer teachers (308,904) served approximately the same number of 6–21 year old special education students.[327]

Between 1989–1990[328] and 1992–1993, the largest special education teacher category was the learning disabilities category, which employed more than 30 percent of special education teachers (98,125 in 1992–1993) serving students between the ages of 6 and 21.[329] This proportion is consistent with the fact that about one-half of all students with disabilities are identified as having learning disabilities. During the same period, about 25 percent of special education teachers taught students in cross-categorical classes, where students with a variety of disabilities are served.[330] In 1992–1993, students with serious emotional disturbance and those classified as mentally retarded were served by almost 30,000 and 43,106 teachers, respectively.[331]

Based on data collected by DOEd between the late 1980s and 1990, regular academic classes averaged one teacher and 23 students, 2 or 3 of whom had disabilities.[332] Approximately 7 percent of teachers reported that they had aides in their classrooms to assist students with disabilities. Special education classes averaged one teacher and a part-time aide to instruct nine students.[333]

Fewer than 50 percent of students with disabilities in regular academic classes had their progress monitored by a special education teacher, but tutoring from a special education teacher was provided to more than 33 percent of students with disabilities who were placed in regular classes.[334] Most regular education teachers[335] received support for educating students with disabilities; the support tended to be in the form of consultation with the school's special education staff.[336]

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[323]Ibid., p. 28.

[324]The most recent of available data on special education teachers, by disability, is 1992–1993 school year. Also, the year 1992–1993 is the first year that States were required to report the number of full-time equivalent (FTE) teachers by all specific disability categories. *See* DOEd, *1995 IDEA Report*, p. 29.

[325]DOEd, *1995 IDEA Report*, p. 29. Note that this figure does not include regular classroom teachers and other staff who provide services to students with disabilities as part of the general education program.

[326]DOEd, *1995 IDEA Report*, p. 11.

[327]DOEd, *1994 IDEA Report*, p. 22.

[328]The year 1989–1990 is the first year of available data on the numbers of special education teachers by disability category.

[329]DOEd, *1992 IDEA Report*, p. 39; DOEd, *1994 IDEA Report*, p. 21; and DOEd, *1995 IDEA Report*, p. 29.

[330]DOEd, *1994 IDEA Report*, p. 21, and DOEd, *1995 IDEA Report*, p. 29.

[331]DOEd. *1995 IDEA Report*, p. 29.

[332]Ibid., p. 75.

[333]Ibid., p. 75.

[334]Ibid.

[335]"Most" was not defined in terms of percentages by DOEd.

[336]DOEd, *1995 IDEA Report*, p. 75.

Students with Disabilities Exiting Educational Programs

Basis of Exiting the Educational System for Students with Disabilities: 1989–1990 to 1991–1992[337]

The bases for exiting special education programs include graduation with a diploma, graduation with a certificate of completion/modified diploma, dropping out, reaching maximum legal age for which special education services are available (and students can thereby no longer accumulate necessary credits for graduation), and status unknown.[338]

At the culmination of the 1991–1992 school year, approximately 229,368 students with disabilities exited the educational system.[339] Approximately 44 percent of students with disabilities who exited the special education system received a standard diploma, while 14 percent received a certificate of completion/modified diploma. Almost 2 percent reached the maximum age for services[340] and consequently exited the educational system before completing graduation requirements.[341] Approximately 22 percent dropped out.[342] The remaining 18 percent exited with status unknown.[343]

Between 1989–1990 and 1991–1992, the rate at which students with disabilities exited by dropping out decreased from 27 percent[344] to 22 percent.[345] The total high school graduation rate (reflects recipients of diplomas and certificates combined) in 1991–1992 (58 percent of exiters) was slightly higher than that 2 years earlier (57 percent).[346] The proportions of graduates who received high school diplomas relative to certificates of completion were similar in the 2 years.[347]

Summary of Exiting Patterns Among Students with Specific Disabilities: 1989–1990 to 1991–1992

In any school year, the percentage of students exiting through each basis varies considerably from one disability group to another. However, for the entire period of analysis, graduation with a diploma was the most common basis of exit for *all* disability groups except students with SED.[348] In 1989–1990, youth with specific learning disabilities were slightly more likely to graduate than students with all disabilities combined, at 62 percent.[349] In 1991–1992, approximately 61 percent of students with learning disabilities graduated (50 percent with a diploma and 11 percent with a certificate), while 21 percent dropped out[350] (down from 27 percent in 1989–1990[351]). In all 3 years, fewer than 1 percent of exiting students with learning disabilities exited because they reached the maximum age of 21 years before completing high school.[352]

In 1991–1992, the percentage of youths classified as mentally retarded exited their K–12 schooling by graduating at a rate slightly higher than that of their peers with learning disabilities.[353] Much larger proportions of students with mental retardation graduated through the certificate method (e.g., 28 percent in 1991–1992) than did their counterparts with learning disabilities (e.g., 11 percent in 1991–1992).[354] Therefore, students classified as mentally retarded were less likely (e.g., 37 percent in 1991–1992) than students with learning disabilities (e.g., 50 percent in 1991–1992) to graduate via a high school diploma.[355] In each of the examined years, the high school dropout rate among students classified as mentally retarded (e.g., 20 percent in 1991–1992) remained below the average for all students with disabilities (e.g., 22 percent in 1991–

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[337]The years selected were based on available data. Beginning with the collection of 1992–1993 data, instead of calculating and reporting the *percentage of exiters by exit category (e.g., graduate with diploma, dropout)*, DOEd began calculating and reporting the *percentage of all students with disabilities age 14 or older* who are exiting in each category in a given year. As a result, comparable data on exiting patterns among students with disabilities are available from 1989–1990 to 1991–1992. *See* DOEd, *1994 IDEA Report*, p. 17.

[338]"Status unknown" includes students who transferred to other school districts but were not known to be continuing their education, students who did not formally withdraw from school but simply stopped attending school, students who may have returned to or were placed in regular education, students who may have moved without requesting transcripts, and students who died. *See* DOEd, *1992 IDEA Report*, p. 32. Therefore, it is not always the case that the "status unknown" exit category is composed solely of high school dropouts. *See*, DOEd, *1994 IDEA Report*, p. 17.

[339]DOEd, *1994 IDEA Report*, p. 15.

[340]Upper age limits for service vary by State. *See* DOEd, *Digest 1995*, p. 112.

[341]DOEd, *1994 IDEA Report*, p. 16.

[342]As shown above, in 1990–1991, the dropout rate for all students combined (i.e., nondisabled and those with disabilities) was 11 percent. *See* DOEd, *1994 Digest*, p. 110.

[343]DOEd, *1994 IDEA Report*, p. 16. *See* table 4.14.

[344]DOED, *1992 IDEA Report*, p. 33.

[345]DOEd, *1994 IDEA Report*, p. 16.

[346]DOEd, *1992 IDEA Report*, p. 34; and DOEd, *1994 IDEA Report*, p. 19.

[347]*See* table 4.14.

[348]*See* table 4.14.

[349]DOEd, *1992 IDEA Report*, p. 34. *See* table 4.14.

[350]DOEd, *1994 IDEA Report*, p. 19.

[351]DOEd, *1992 IDEA Report*, p. 34.

[352]*See* table 4.14.

[353]*See* table 4.14.

[354]*See* table 4.14.

[355]DOEd, *1994 IDEA Report*, p. 19.

TABLE 4.14
Basis of Exit for Students with Different Disabilities, by Percentage of Exiters in Various Disability Categories: School Years 1989–1990 to 1991–1992

	Diploma	Certificate	Dropout	Maximum age	Status unknown
1989–1990					
All disabilities	44.8	12.4	27.0	2.5	13.3
L.D.	51.9	10.0	26.8	0.5	10.9
M.R.	37.5	24.4	23.6	6.7	7.8
S.E.D.	30.7	6.1	43.2	2.2	17.8
1990–1991					
All disabilities	45.7	13.3	23.3	2.0	15.8
L.D.	51.7	10.8	22.2	0.7	14.7
M.R.	38.7	24.6	21.6	5.2	9.9
S.E.D.	30.8	7.9	37.2	1.3	22.9
1991–1992					
All disabilities	43.9	13.5	22.4	1.9	18.3
L.D.	49.7	10.8	21.3	0.5	17.7
M.R.	36.1	27.7	19.6	6.0	10.5
S.E.D.	28.1	6.5	35.0	1.0	29.4

Sources: U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children with Disabilities: Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, D.C., 1992), p. 34; U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics 1994*, by Thomas Snyder et al. (Washington, D.C.: Government Printing Office, October 1994), p. 112; and U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children with Disabilities: Sixteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, D.C., 1994), p. 19.

Disability abbreviations:
L.D.—Specific learning disabilities
M.R.—Mental retardation
S.E.D.—Serious emotional disturbance

1992).[356] However, in contrast, students with mental retardation were much more likely than all disabilities combined to exit because of reaching maximum age for service delivery.[357]

The exiting patterns of students with serious emotional disturbance were considered the most troubling to DOEd of all disabilities.[358] Also based on 1991–1992 data, for instance, only 35 percent of exiting students with serious emotional disturbance graduated (28 percent with a diploma, 7 percent with a certificate). The 35 percent dropout rate (the highest among any group of students with disabilities) was more than 1.5 percent times the 22 percent average for all students with disabilities.[359] Most[360] students with serious emotional disturbance who drop out tend to do so by 10th grade.[361] As a result, fewer than 3 percent of students with serious emotional disturbance between 1989–1990 and 1991–1992 persisted in secondary school to reach the maximum age limit to continue receiving special education service.[362]

[356]Ibid. *See* table 4.14.
[357]*See* table 4.14.
[358]DOEd, *1992 IDEA Report*, p. 35.
[359]DOEd, 1994 *IDEA Report*, p. 19.
[360]The percentage of "most" was not defined.
[361]DOEd, *1994 IDEA Report*, p. 109.
[362]*See* table 4.14.

High School Dropouts Among the Disability Community

In any of the years assessed between 1989–1990 and 1991–1992, the dropout rate among students with disabilities is greater than that of all students combined, which ranged between 11 and 13 percent during the 4-year period, as shown in various sections above. Similar to the decision to drop out by students who do not have disabilities, dropping out of school is *usually* the culmination of a cluster of school performance problems, including high absenteeism and poor grade performance.[363]

If students with disabilities progressed to high school, they tended to stay in high school until they were the same age as typical students who graduated.[364] The average age at which high school students with disabilities dropped out was 18, and the average age for graduation was 19. However, a 1991 study revealed that approximately 8 percent of students with disabilities dropped out of school before enrolling in 9th grade. Of students with learning disabilities, 4.4 percent dropped out in 9th grade, compared to 7.3 percent and 8.6 percent of their peers classified as mentally retarded and seriously emotionally disturbed, respectively.[365]

Relationship of Ingrade Retention to Dropout Status

Young adults with disabilities are more likely to repeat one or more grades than those without a

[363]The NLTS collects ongoing information on secondary school performance. Recent survey data revealed that on average, 11 percent of students with disabilities do not receive grades in any courses during secondary school. Receiving grades is strongly related to the nature and severity of students' disabilities. For instance, only 5 percent of students with learning disabilities did not receive any grades, whereas 25 percent of those classified as mentally retarded did not receive any grades. Approximately 54 percent of students with disabilities who attended separate schools did not receive any grades in courses. In addition, the almost 66 percent of special education students who were not assigned to specific grade levels also did not receive any specific course grades. *See* DOEd, *1992 IDEA Report*, p. 89.
DOEd acknowledges that when examining course grades (as measures of student performance) among the special education student population, in relation to high school dropout rates, students with the most severe disabilities and lowest functional skills are eliminated from the analyses. These students tend to exit secondary school by reaching maximum age, as opposed to deciding to drop out. Therefore, the dropout rate among the special education community is higher among those students who are considered "higher mental functioning" and are assigned course grades for their academic performance. *See* DOEd, *1992 IDEA Report*, pp. 81, 89.
[364]DOEd, *1994 IDEA Report*, p. 98.
[365]Ibid., p. 99.

disability.[366] In 1992, while fewer than 12 percent of all students were retained in grade at least once,[367] almost one-third of students with any disability repeated at least one grade; and more than half (51 percent) of students with a learning disability had at least one grade retention.[368]

However, among those who had been retained, students with disabilities had dropout rates similar to those with no disability.[369] Almost 20 percent of all students who experienced at least one grade retention dropped out of school. The rates for students with any disability or specifically a learning disorder were 21 and 17 percent, respectively.[370]

Outcomes of High School Completers Relative to Dropouts

Students with disabilities who graduated from high school had distinct advantages as they entered the postschool phases of their lives compared to their peers who dropped out. For instance, graduates who were out of school up to 2 years were estimated to be 17 percentage points more likely to have obtained competitive employment than were dropouts with similar disability status and similar individual, household, and community characteristics.[371] Students with disabilities who graduated from high school were estimated to be 14 percentage points more likely than dropouts to have enrolled in postsecondary school, and they were 27 percentage points more likely to have become engaged in work- or education-related activities outside the home after high school.[372]

Also similar to dropouts of regular education, students with disabilities who do not complete their secondary schooling face a difficult world as adults.[373] Their experiences are characterized by lower levels of employment and wages and by higher rates of problems with the law.[374] For instance, a 1991 study sponsored by DOEd revealed that students with learning disabilities who dropped out of high school were represented disproportionately among those who had been arrested; 27 percent of adults[375] (former students with learning disabilities) who had been arrested were dropouts, compared with 7 percent of those never arrested.[376]

NLTS data suggest that if schools can give students with disabilities reasons to come to school and help students achieve in their courses, they can help many students persist in school. If educators are able to help students perform up to their ability and to school expectations, they can reduce the likelihood of students with disabilities withdrawing from school before completion and will have improved the students' prospects for success in their adult years.[377] According to DOEd, schools need continually to determine what the education community (and supporting services) can do to support students with disabilities in making a transition from the schooling environment to an independent and fully functioning (as possible) adulthood more effectively.[378] However, there is no single answer in terms of "what works" because of the significant and growing diversity of students attending the Nation's public schools.[379]

Early Postschool Results of Youth with Disabilities

Students with disabilities who have certain characteristics are less prone to having difficulty in making the transition from school to adult life.[380] More specifically, students with less significant disabilities (i.e., those who have a higher functioning level) tend to spend more of their time as secondary students in the regular classroom, as shown throughout this section on special education, and have postsecondary outcomes more similar to their nondisabled peers than to their peers with more severe disabilities.[381]

Participation in Postsecondary Education as a Function of Instruction Time in Less Restrictive Classroom Environments

Based on NLTS data from a 1987 high school graduating class, among students with disabilities who did participate in postsecondary academic programs, a large majority (70 percent) during their secondary school years had the skills and relatively high functioning capacity (in comparison to their peers with more severe disabilities whose educational needs warranted placement in more restrictive environments) to spend at least 75 percent of their time in high school

[366]DOEd, *Education 1994*, p. 30.
[367]Ibid.
[368]Ibid.
[369]Ibid.
[370]Ibid.
[371]DOEd, *1992 IDEA Report*, p. 108.
[372]Ibid., p. 108.
[373]DOEd, *1994 IDEA Report*, p. 97.
[374]Ibid.
[375]The age ranges of the adults surveyed were not identified.
[376]DOEd, *1992 IDEA Report*, p. 108.
[377]Ibid.
[378]DOEd, *1995 IDEA Report*, p. 73.
[379]DOEd, *1992 IDEA Report*, p. 102.
[380]DOEd, *1995 IDEA Report*, p. 73.
[381]Ibid., p. xxiii.

regular education.[382] Slightly fewer than 23 percent of postsecondary education participants spent between 26 and 74 percent of their school time in regular classroom.[383] Furthermore, only 7 percent of those who went on to postsecondary academics spent less than 25 percent of their high school education time in regular education classrooms during high school.[384] The data from DOEd's NLTS also show that the increased time in regular education enhances students' overall intellectual and social competence by providing better preparation for postsecondary experiences.[385]

Participation in Postsecondary Education as a Function of Type or Severity of Disability

Youth with disabilities continue to be less likely than their peers in the general population to participate in postsecondary education.[386] However, according to the American Council on Education, the number of freshmen with disabilities entering college tripled between 1978 and 1991 (from 2.2 percent to 8.8 percent of all freshmen).[387] DOEd's NLTS data collected in the late 1980s and early 1990s suggest that, among youth with disabilities within 3 years after graduating from high school, 16.5 percent enrolled in academic programs, while 14.7 percent enrolled in vocational postsecondary programs.[388]

The NLTS data (from the late 1980s through the early 1990s) further revealed that youth in some disability categories pursued postsecondary education in greater numbers than others, especially since the disability categories cover a wide range of skill and functioning level among students.[389] For instance, 19 percent of students with specific learning disabilities were enrolled in an academic program in a postsecondary institution at some point within 3 years after secondary school completion, compared to 15 percent of their peers with serious emotional disturbance, and fewer than 3 percent of their peers classified as mentally retarded.[390]

[382]Ibid., p. xxiv.
[383]Ibid., p. 79.
[384]Ibid., p. 79.
[385]Ibid., p. xxiii.
[386]Ibid., p. 77.
[387]Ibid., p. xxiv.
[388]Ibid., p. xxiv.
[389]Ibid., p. 77.
[390]Ibid., p. 78.

Education of Students with Limited English Proficiency

This section focuses on the demographic characteristics, identification, assessment, and placement (in programs) of the Nation's linguistically and culturally diverse population of limited-English-proficient students (LEP).[391] Prior to being identified by their States and/or local school districts as "students with limited English proficiency," these students are first distinguished by their membership in the larger language minority population.[392] Subsequently, a student is identified and assessed by State and/or local procedures as "limited English proficient" if he or she demonstrates a need for assistance in speaking, reading, writing, and understanding English, in order to learn successfully and compete in all-English classrooms.[393] Students who are from language minority backgrounds and have English-proficiency difficulties are entitled under Title VI of the Civil Rights Act to special programs and services to acquire effective English-language skills.[394]

Defining "Limited English Proficiency"

The U.S. Supreme Court's interpretation of Title VI in the *Lau*[395] decision required that school districts

[391]The term "limited English proficient" includes children who are "non-English speaking," as well as those who are "limited English speaking." It can also include those who are limited in English reading, writing, and/or comprehension skills if tests measure those skills. *See* Center on Evaluation, Development, Research, *Bilingual Education: Time to Take a Second Look?* (Bloomington, IN: Phi Delta Kappa, 1990), p. 27; and Dorothy Waggoner, *Language Minority Children at Risk in America: Concepts, Definitions, and Estimates* (Washington, DC: National Council of La Raza, October 1984), p. 7. Lau Team, *Promising Practices and Programs for Serving National Origin Limited English Proficient Students*, March 1996, p. i (hereafter cited as Lau Team, *Serving LEPs*).
[392]U.S. Department of Education, *The Condition of Bilingual Education in the Nation: A Report to the Congress and the President* (Washington, DC: June 1992), p. 23 (hereafter cited as DOEd, *Condition of Bilingual Education*).
[393]Ibid., p. 11.
[394]B. Levin, "An Analysis of the Federal Attempt to Regulate Bilingual Education: Protecting Civil Rights or Controlling Curriculum?" *Journal of Law and Education*, vol. 12, no. 1 (January 1983), p. 35 (hereafter cited as Levin, "Regulate Bilingual Education"). As a matter of civil rights, school districts are not allowed to base their concept of "English proficiency" exclusively on English speaking skills (and thereby restrict English language instruction classes to students who have difficulty with oral proficiency in English). *See* Waggoner, *Language Minority Children at Risk in America*, p. 15; and DOEd, *Education 1994*, p. 130.
[395]Lau v. Nichols, 414 U.S. 563 (1974).

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provide instructional assistance to students whose primary language is other than English and who have limited or no English proficiency.[396] However, the *Lau* Court did not define the term "limited English proficient" or prescribe the *kind* of education program required to meet its mandate for "affirmative steps."[397] In effect, the language used by the Court required policymakers and practitioners to develop guidelines in meeting the legal obligations created by the Court.

To meet the Court's mandate, school districts first had to undertake a process of identifying student participants before beginning to develop education programs that would remedy their "language deficiency." However, to begin this process, school districts had to first determine *which* students required such assistance. This determination required a definition of the meaning of "language deficiency."

Federal policymakers at the Department of Health, Education, and Welfare's Office for Civil Rights sought to develop standards in identifying and developing education programs for the students who required the assistance mandated in *Lau*. HEW/OCR issued policy guidelines in August 1975.[398]

Federal education policy refers today to students who are "limited English proficient." Congress has provided a legal definition for this term in the Bilingual Education Act:

> The terms "limited English proficiency" and "limited English proficient," when used with reference to an individual, mean an individual—"(A) who—"(i) was not born in the United States or whose native language is a language other than English and comes from an environment where a language other than English is dominant; or "(ii) is a Native American or Alaska Native or who is from an environment where a language other than English has had a significant impact on such individual's level of English language proficiency; or "(iii) is migratory and whose native language is other than English and comes from an environment where a language other than English is dominant; and "(B) who has sufficient difficulty speaking, reading, writing, or understanding the English language and whose difficulties may deny such individual the opportunity to learn successfully in classrooms where the language of instruction is English or to participate fully in our society.[399]

In this report, the term "students whose primary language is other than English and who have limited or no English proficiency" is intended to refer only to those students who rely on a language other than English in communicating. DOEd policies and the language of Title VI, *Lau v. Nichols*, and the Equal Educational Opportunities Act accord civil rights protections only to those students whose language of *national origin* is not English and for whom, as a result, instruction in English is not comprehensible.[400]

The Bilingual Education Act adopts the consensus that students whose primary language is not English and who have limited or no English proficiency are those who, by some measure, have insufficient English-language capabilities to succeed in an all-English classroom environment.[401] The Office of Bilingual

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[396]The Supreme Court held that the San Francisco Unified School District's failure to provide English language instruction denied a "meaningful opportunity" for students having limited or no English proficiency to participate in the regular education program (*Id.* at 568) and that "there is no equality of treatment merely by providing students with the same facilities, textbooks, and curriculum." *Id.* at 568.

[397]The Court stated that under Title VI school districts' obligations to provide equal educational opportunity for all children includes the responsibility to take affirmative steps "to rectify the language deficiency in order to open" regular education programs to students having limited or no English proficiency." *Id.*

The Court did not make any specific requirements with respect to the remedies school districts should use in undertaking affirmative steps. Justice Douglas, writing for a unanimous Court, stated that: "No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instruction to this group in Chinese is another. There may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and to rectify the situation." *Id.* at 564–65.

[398]Officially entitled "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under *Lau v. Nichols*," they were informally known as the "*Lau* Guidelines" or "*Lau* Remedies."

[399]20 U.S.C.A. § 7601(8)(A)–(B) (Supp. 1995).

[400]*See* 42 U.S.C. § 2000d; 414 U.S. 463 (1974). Although Title VI protects LEP students against discrimination (based on their national origin), DOEd does not directly present information (e.g., on measures of educational achievement and indicators of achievement) by LEP students' national origin.

[401]There remains significant controversy in the education research community over who may deemed a person who has "limited English proficiency." For example, one Federal court ruled that the term included speakers of the so-called "Black English" dialect. In *Martin Luther King Jr. Elementary School Children v. Michigan Board of Education*, 451 F. Supp. 1324 (E.D. Mich. 1978), a Federal court in Michigan held that the school district violated the Equal Educational Opportunities Act of 1974 by failing to provide a special language remediation program for students who spoke "Black English." The act states that "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by — (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). The plaintiffs argued that "Black English"

Education and Minority Language Affairs has noted that this definition is limited to a description of students whose primary language is other than English and who have limited or no English proficiency status relative to a student's inability to function in the all-English classroom.[402] However, the screening and diagnostic procedures used to identify "limited English proficiency" vary widely among States and local school districts.[403]

The U.S. Department of Education, Office for Civil Rights, has provided a "*Lau* glossary" to its regional staff containing definitions for a number of key terms associated with its evaluation of education programs.[404] The *Lau* glossary defines "limited English proficiency" as "students with a primary language other than English who have such difficulty with the English language that the opportunity to participate effectively in school may be denied when English is the exclusive language of instruction."[405] The glossary defines the term "primary language" as meaning "the first language the students acquired."[406] In addition, the glossary defines "national origin minority students" as those students "whose country of origin (*or family's country of origin*) is a non-English-speaking country."[407] These terms provide the basis on which Federal education law and policy, both education program and civil rights, establishes procedures and guidelines for evaluating the development and implementation of school district education programs.

Historical Underpinnings of Educating Students with Limited English Proficiency

As a brief background of bilingual education in the Nation, since 1974 all school districts that accept Federal funds must comply with regulatory guidelines and agree to provide programs that meet the needs of LEP students. That is, localities must take "affirmative steps" to rectify students' English-language deficiencies and enable speakers of other languages to acquire effective communication skills, so that all of the instructional programs are open to each student.[408] School districts' failure to enable these students to acquire effective English-language skills would be a violation of Title VI of the Civil Rights Act.[409]

The Bilingual Education Act imposed an affirmative duty on school officials to provide special assistance to LEP students.[410] Localities are thereby charged with the responsibility for ensuring that high standards of academic performance and equal access to quality education apply to limited-English-proficient students, in addition to their more English-fluent peers.[411] As a result, DOEd's Office of Bilingual Education and Minority Affairs provides some funding (as a fiscal incentive) to localities to establish and/or maintain programs for limited-English-proficient students.[412]

The U.S. Department of Education's Office for Civil Rights allows school districts broad discretion in devising ways to ensure equal educational opportunity for LEP students, and schools/districts may tailor and/or modify their practices based on factors such as available funding, size and diversity of the student population, number of languages spoken, staff resources, and community needs.[413] A State and/or local education agency can provide funds to its schools for programs

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was "so different from the English commonly spoken in the public school as to constitute a language barrier which impedes their equal participation in. . .instructional programs." 451 F. Supp. 1324, 13--. They further argued that such students were therefore being denied equal educational opportunity on account of their race and were entitled to the same kind of relief as other students of "limited English proficiency." The issue of whether the term "language barrier" in the Equal Educational Opportunities Act may be properly interpreted to include dialects or vernaculars other than English is addressed in the discussion on civil rights enforcement policy. For purposes of this section, the definitions of "limited English proficiency" and "native language" refer to their meanings as state in the current Bilingual Education Act at 20 U.S.C.A. §§ 7401–7602 (Supp. 1995).

[402]DOEd, *Condition of Bilingual Education*, p. 10.

[403]The lack of uniformity in screening and diagnostic procedures is treated in more detail later in this chapter.

[404]*See* U.S. Department of Education, Office for Civil Rights, "Note to the Regional Civil Rights Directors," Sept. 27, 1995 (hereafter cited as *Lau* glossary).

[405]*Lau* glossary, p. 6. In addition, the *Lau* glossary offers a definition provided by its Region IX office, which states that "[t]he acronym, LEP stands for 'limited English proficiency' and is a term used to identify any student whose first language is not English and who has been determined by a variety of tests as not possessing sufficient English language skills to succeed in all regular classroom programs." Ibid.

[406]Ibid., p. 9.

[407]Ibid., p. 8. [emphasis added].

[408]Michael Rebell and Anne Murdaugh, "National and Community Values: Part II: Equal Educational Opportunity for Limited English Proficient Student," *Journal of Law and Education*, vol. 21, no. 3 (Summer 1992), p. 357.

[409]Ibid.

[410]Levin, "Regulate Bilingual Education," p. 33.

[411]Lau Team, *Serving LEPs*, p. i.

[412]Levin, "Regulate Bilingual Education," p. 33.

[413]Lau Team, *Serving LEPs*, p. i. DOEd does not endorse any particular pedagogical approach or specific remedy towards bilingual education. That is, *how* equal opportunity should be implemented continues to not be specified in the Bilingual Education Act or any of its amendments. *See* Rebell and Murdaugh, "National and Community Values," p. 345.

such as bilingual education,[414] English as a second language (ESL),[415] sheltered English,[416] or immersion[417] approaches to instructing LEP students. Regardless of the remedy chosen, needs of all LEP children must be met.[418]

The Language Minority School-Age Population

The language minority population between the ages of 5 and 17 is a potential at-risk student population with complex linguistic and educational needs.[419] This population is a group of students who *may be* in need of intervention strategies to enable them to have an equal opportunity to succeed in school programs offered only in English.[420] Language minority students are those whose family or home language is other than English. A part of this population is English proficient, while another part is not (and would thereby be in need of special programs to succeed in school).[421]

Current Status of the Language Minority Student Population

In 1970, 33.7 million people claimed to be primarily speakers of non-English languages, and about 5.0 million were children between the ages of 5 and 18.[422] One decade later, in 1980, about 4.6 million youngsters were members of a language minority, and they accounted for 9.6 percent of the total 47.5 million school-age population.[423] By 1990[424] the number of language minority students reached 6.3 million (or 14 percent of the total 45.3 million school-age population).[425] In 1990 California, New Mexico, Texas, New York, and Arizona had more than 20 percent of their student population classified as members of a language minority.[426]

California had the highest proportion (35 percent) and size (1.9 million) of its total K–12 population classified as members of a language minority.[427] The language minority student population in California accounted for 30 percent of the Nation's entire population of such students.[428] Various linguistically and culturally distinct groups comprise California's language minority population, and almost 100 languages are represented in the State's public schools.[429] Because California's language minority population is more mobile or transient than its more English-fluent population, the student composition shifts between and within years.[430] Children depart or enter school at various times, and the demographic characteristics over the duration of programs (such as English acquisition classes geared to students with a particular linguistic and cultural background) can change in unpredictable ways.[431] For instance, according to DOEd, in the early 1990s, various schools that were examined in a case study experienced successive changes in their non-English-language groups within a short time period. One school in California that

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[414]According to DOEd, bilingual education is an instructional approach to teaching students with limited English proficiency in which the students' native language is used to varying degrees—to the extent necessary to teach basic skills and ensure that children remain on grade level with their peers in other subjects while they learn English. *See* DOEd, *Education 1995*, p. 343, and Jose Gonzalez and Lori Orum, *Short Answers to Common Questions About Bilingual Education*, (Washington, DC: National Council of La Raza, November 1981), p. 2. Spanish LEP students were much more likely to receive instruction using their native language than were LEP students in other language groups. *See* Howard Fleischman and Paul Hopstock, *Descriptive Study of Services to Limited English Proficient Students: Summary of Findings and Conclusions* (Arlington, VA: Development Associates, Inc., 1993), p. 22.

[415]In an English as a second language program, students with limited English proficiency are provided with intensive instruction in English. *See* DOEd, *Education 1995*, p. 345. In "ESL pullout," LEP students are removed from their self-contained classroom for a special class aimed at teaching the English language (providing students with oral and written communication skills). The English language is the only medium of instruction for this approach. *See* DOEd, *Condition of Bilingual Education*, p. 45.

[416]In sheltered English, content and ESL instruction are provided in a self-contained classroom, and teachers use a simplified form of English and modify their teaching techniques to make instruction comprehensible to LEP pupils. English is the exclusive means of instruction for this approach. See DOEd, *Condition of Bilingual Education*, p. 45.

[417]Immersion is an instructional program in which teachers speak only English to LEP students. The teacher in an immersion program, however, understands the language of LEP students, and the students may speak to the teacher in the language spoken at home. *See* Center on Evaluation, Development, Research, *Bilingual Education*, p. 94.

[418]Waggoner, *Language Minority Children at Risk*, p. 15.

[419]Ibid. and Maria Torres-Guzman, "Language Minorities: Moving from the Periphery to the Center?" *The Educational Forum*, Summer 1994 (vol.58), p. 410.

[420]Waggoner, *Language Minority Children at Risk*, p. 15.

[421]DOEd, *Condition of Bilingual Education*, p. 24.

[422]Waggoner, *Language Minority Children at Risk*, p. 4.

[423]DOEd, *Education 1994*, p. 307.

[424]The most recent data available on the language minority student population are from the 1990 U.S. Census.

[425]DOEd, *Education 1994*, p. 308.

[426]Ibid.

[427]Ibid.

[428]*See* table 4.15.

[429]DOEd, *Condition of Bilingual Education*, p. 25.

[430]Ibid.

[431]Ibid.

TABLE 4.15
Children and Youth 5 to 17 Years Old Who Speak a Language Other than English at Home and Who Speak English with Difficulty, by State: 1980 and 1990

Numbers of children and youth

	1980			1990		
	All children 5 to 17	Total speakers of other languages	Total who speak English with difficulty	All children 5 to 17	Total speakers of other languages	Total who speak English with difficulty
US	47,493,975	4,568,329	1,883,395	45,342,448	6,322,934	2,388,243
AL	867,635	14,379	3,900	779,216	23,122	8,117
AK	91,871	9,800	4,616	117,070	11,158	4,111
AZ	578,750	129,814	60,213	688,361	156,782	61,069
AR	495,992	8,023	2,396	457,208	13,587	4,304
CA	4,685,403	1,073,945	493,641	5,363,005	1,878,957	796,905
CO	593,914	47,351	16,445	608,578	51,202	17,908
CT	638,990	70,212	24,047	522,667	78,041	26,738
DE	125,470	5,557	1,769	114,559	7,403	2,765
DC	109,311	5,817	1,956	80,008	9,444	3,989
FL	1,794,858	205,592	66,466	2,021,858	360,452	113,441
GA	1,235,867	27,690	8,569	1,236,622	55,976	19,834
HA	198,167	29,475	14,432	198,205	29,600	11,253
ID	213,569	9,928	3,692	227,791	13,241	4,633
IL	2,407,255	234,957	90,040	2,103,057	302,087	102,031
IN	1,200,631	43,154	15,105	1,059,526	51,651	19,078
IA	605,996	15,834	5,439	526,115	20,740	7,375
KS	468,820	17,146	6,253	474,043	25,036	8,818
KY	801,733	12,860	4,131	705,277	20,063	7,475
LA	971,609	49,221	16,967	895,657	49,382	16,826
ME	243,690	12,884	3,581	223,494	9,886	2,655
MD	895,619	45,256	13,832	806,039	67,904	21,879
MA	1,155,475	106,410	37,626	940,711	143,528	50,444
MI	2,068,134	80,218	24,066	1,761,163	95,963	27,815
MN	867,061	24,767	8,129	831,671	42,163	17,013
MS	602,032	10,277	3,603	552,960	16,594	6,186
MO	1,010,684	24,710	7,873	947,101	33,731	1,230
MT	167,426	5,372	2,115	163,940	6,382	12,230
NE	324,887	8,891	2,731	309,706	11,256	3,323
NV	159,786	11,984	4,344	203,376	24,055	8,953
NH	196,172	9,183	2,145	194,492	8,561	2,587
NJ	1,530,830	205,109	71,703	1,269,172	245,795	76,273
NM	303,120	110,624	48,471	321,418	94,719	33,779
NY	3,559,784	612,561	233,945	3,008,894	700,788	247,948
NC	1,256,408	26,038	8,054	1,152,157	54,382	21,784
ND	136,996	3,872	1,111	127,720	3,456	894

(continued)

TABLE 4.15 (continued)
Children and Youth 5 to 17 Years Old Who Speak a Language Other than English at Home and Who Speak English with Difficulty, by State: 1980 and 1990

Numbers of children and youth

	1980			1990		
	All children 5 to 17	Total speakers of other languages	Total who speak English with difficulty	All children 5 to 17	Total speakers of other languages	Total who speak English with difficulty
OH	2,307,791	86,066	27,504	2,019,893	100,589	36,570
OK	623,293	20,914	8,101	613,015	28,351	9,473
OR	525,901	23,328	9,053	522,568	36,776	13,169
PA	2,379,510	111,958	40,130	2,000,469	136,203	49,787
RI	186,659	18,585	6,860	158,964	25,970	8,928
SC	705,533	15,813	4,840	666,884	23,346	8,068
SD	148,151	7,082	2,912	144,167	5,849	1,930
TN	974,666	17,152	5,583	883,214	28,694	9,702
TX	3,143,074	803,353	413,393	3,454,664	974,282	391,881
UT	349,752	18,914	7,552	458,429	25,434	8,428
VT	110,001	3,715	850	102,343	3,212	774
VA	1,113,789	42,727	13,014	1.063,388	74,634	23,668
WA	833,853	46,706	18,220	893,647	78,267	30,077
WV	414,460	6,487	1,431	337,661	9,129	2,815
WI	1,012,663	33,320	9,675	930,099	51,171	19,320
WY	100,934	4,198	891	100,206	3,940	1,118

Source: U.S. Department of Education, National Center for Education Statistics, *Condition of Education 1994*, by Thomas Smith et al. (Washington, D.C.: Government Printing Office, August 1994), pp. 307 and 308.

developed a bilingual education program for its predominantly Spanish speaking linguistic minority population later had to cope with ensuing waves of Afghan and Russian immigrants.[432]

Following California as States with large percentages of the student population from linguistic minority backgrounds are New Mexico (30 percent of 5 to 17 year olds), Texas (28 percent), and New York and Arizona (23 percent each). Altogether, about 2 million of the Nation's linguistic minority children (or 30 percent) resided in these four States.[433]

Overall in the Nation, Hispanics and Asian Americans are the major components of the language minority student population.[434] Among the Asian Americans, about 20 percent are of Filipino backgrounds, 17 percent of Chinese origin, and another 13 percent of Southeast Asian origin. Other significant groups include Korean, Pacific Islander, and Japanese origins.[435] About 75 percent of Asian American students come from bilingual families, and most rate themselves (based on census data) as having high proficiency in English and a low proficiency in their native languages. Those with higher socioeconomic status are more likely to possess high English proficiency than those from lower socioeconomic backgrounds.[436]

The Hispanic language minority student population also is diverse.[437] About 66 percent are of Mexican background, and 11 and 4 percent are of Puerto Rican and Cuban ancestry, respectively.[438] Similar to Asian students, most Hispanics also were from bilingual homes and described themselves as more proficient in English than in their home language.[439] In addition, English proficiency was directly related to socioeconomic status.[440]

Home Languages of Children and Youth

Based on 1990 census data, about 66 percent (4.2 million) of the 6.3 million language minority children speak Spanish at home. Seven other languages have at least 100,000 speakers aged 5 to 17. French is spoken by almost 270,000 youngsters; Chinese languages by 219,000, and German by 183,000.[441] All other languages spoken by more than 100,000 children and youth are Asian: Vietnamese, Asian Indian, Korean, and Filipino (e.g., Tagalog and Ilocano).[442]

The Number and Geographic Distribution of Language Minority Students who are Limited English Proficient

The number of language minority students who are "limited English proficient" can be estimated based on the census question on English proficiency asked of all persons who speak a language other than English at home. The 1980 and 1990 census of population asked the following question of those who spoke a language other than English at home: "How well does this person speak English?"[443] Possible responses were "very well," "well," "not well," and "not at all."[444] Persons who replied less than "very well" can be classified as "speaking English with difficulty" or "limited English proficient."[445]

Based on the 1990 census, about 38 percent of the language minority student population had difficulty speaking English.[446] This proportion varied by State. States with a relatively large number of language minority students had greater proportions of language minority students (and all students) who had difficulty speaking English. For instance, in California and Texas, more than 40 percent of their respective language minority school-age populations (or 15 and 11 percent of their respective total school age populations) had difficulty speaking English.[447] In Florida and New York, more than 30 percent of their respective language minority student populations (which accounted for 6 and 8 percent of their respective children and youth) had difficulty speaking English. In contrast, in States such as Vermont and South Dakota, about 25 percent of their respective language minority students (about 1 percent of their 5 to 17 year-olds) reported they had difficulty with English.[448]

Growth of the Language Minority Student Population Who Have Difficulty Speaking English

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[432]Ibid.
[433]*See* table 4.15.
[434]DOEd, *Condition of Bilingual Education*, p. 24.
[435]Ibid.
[436]Ibid., p. 24.
[437]Ibid.
[438]Ibid.
[439]Ibid., p. 25.
[440]Ibid.

[441]Dorothy Waggoner, ed., *Numbers and Needs: Ethnic and Linguistic Minorities in the United States*, vol. 5, no. 4 (Washington, DC: July 1995), p. 2. *See* table 4.16.
[442]Ibid.
[443] DOEd, *Condition of Education 1994*, p. 130.
[444] Ibid.
[445] Ibid.
[446]*See* table 4.15.
[447]*See* table 4.15.
[448]*See* table 4.15.

TABLE 4.16
Estimated Number of 5 to 17 Year Old Home Speakers of Non-English Languages, by Language: 1990

Language	Number of speakers	Language	Number of speakers
Total (all languages)	6,323,000	Italian	94,000
Amerind/Alaska Native	74,000	Japanese	49,000
Arabic	66,000	Korean	116,000
Asian Ind. languages	119,000	Mon-Khmer	49,000
Chinese languages	219,000	Polish	55,000
Farsi	36,000	Portuguese	76,000
French	269,000	Russian	37,000
German	183,000	Spanish	4,168,000
Greek	51,000	Tagalog and Ilocano	102,000
Haitian Creole	44,000	Thai and Laotian	57,000
Hmong	41,000	Vietnamese	135.000

Source: Dorothy Waggoner, editor, *Numbers and Needs: Ethnic and Linguistic Minorities in the United States,* vol. 5, no.4 (Washington, D.C.: July 1995), p. 2.

Note: All languages shown have at least 35,000 speakers between the ages of 5 and 17.

The 1990 census data revealed that more than 5.3 percent of the Nation's 5 to 17 year-olds (or 2.4 million students) had difficulty speaking English, up from 1.9 million in 1980, which represents a 27 percent increase.[449] Growth in the population of students who speak English with difficulty varied by State. For instance, States such as Georgia, Minnesota, and North Carolina had increases of more than100 percent, adding almost 34,000 students who speak English with difficulty. California's 61 percent increase and Florida's 71 percent increase added 303,264 students (the largest State "contribution") and 46,975 students, respectively, to the Nation's 5 to 17 year-olds who need assistance with English skills.[450] Only 10 States experienced a decline between 1980 and 1990 in the number of children who spoke English with difficulty.[451]

Although Texas experienced a 5.2 percent decline in the number of children who had difficulty speaking English (a decline of more than 21,000 students), the State still had the second highest number of such children (more than 11 percent of its 5- to 17-year-old population) among the States.

Based on 1990 data, about 60 percent of the Nation's children who have difficulty speaking English reside in three large States: California (33 percent), Texas (16 percent), and New York (10 percent). Florida and Illinois are tied as the States with the fourth largest percentage of students (about 5 percent each) who are not orally proficient in English. The remaining 46 States (including the District of Columbia) have 2 percent or fewer of the Nation's 5 to 17 year-olds who are reported as not speaking English "very well."[452]

Students with Limited English Proficiency in the Nation's Schools

Distribution of Limited-English-Proficient Students

Although LEP students are spread across the country, they tend to be concentrated in a relatively limited number of school districts. For instance, in the 1991–1992 school year,[453] approximately 6,400 of the country's 15,000 school districts enrolled students with limited English proficiency. The number of LEP students in districts ranged from 1 to 242,000 in Los Angeles School District.[454] Among districts that enrolled LEP students, 24 percent had 9 or fewer such students, while 8 percent had at least 1,000 LEP students.[455] In terms of concentrations of LEP students, almost 50 percent of the school districts with LEP students served student populations that were less than 2 percent LEP, while 6 percent of districts served student populations that were more than 40 percent LEP.[456]

Many of the Nation's schools serve only a small number of LEP students. Twenty percent of schools with any LEP students had fewer than 4 students, while 6 percent served at least 300 LEP students.[457] In 1991–1992, the average number of LEP students per elementary, middle, and high schools were 73, 66, and 87 students, respectively.[458]

Most of the Nation's LEP students are concentrated in lower grades. About 24 percent of LEP students were in kindergarten and 1st grade, while only 8 percent were in the 11th and 12th grades.[459] A concentration in the lower grades also was found when the number of LEP students in each specific grade was compared to the respective total public school enrollment in that grade.[460] For example, 8 percent of the Nation's kindergarten and 1st graders in public schools were students with limited English proficiency, while only 3 percent of high school seniors enrolled in public schools had LEP status.[461]

National Growth in the Limited-English-Proficient Student Population

Based on data collected from State education agencies by the Office of Bilingual Education and Minority Languages Affairs (OBEMLA),[462] In 1993–

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[449]DOEd, *Education 1994*, p. 308. *See* table 4.15.

[450]*See* table 4.15.

[451]*See* table 4.15.

[452]*See* table 4.15.

[453]The year 1991–1992 is the only year of available data on LEP students by school district, school, and grade level.

[454]Howard Fleischman and Paul Hopstock, *Descriptive Study of Services to Limited English Proficient Students: Summary of Findings and Conclusions* (Arlington, VA: Development Associates, Inc., 1993), p. 3 (hereafter cited as Fleischman and Hopstock, *Descriptive Study*); and DOEd, *1993–1994 Biennial Report*, p. 201–2.

[455]Fleischman and Hopstock, *Descriptive Study*, p. 3 .

[456]Ibid.

[457]Ibid.

[458]Ibid., p. 9.

[459]Ibid., p. 5.

[460]Ibid.

[461]Ibid.

[462]OBEMLA maintains data on its grantees, such as State education agencies (SEA) that participate in the Title VII program. Each year, OBEMLA obtains data on the number of LEP students in each State from a survey it administers to SEAs. The explicit purpose of the survey is to collect information on the number of LEP persons in each State, and results are used to inform Congress and DOEd about the size of the LEP population and services available to them. OBEMLA considers this survey information as a census count of LEP students in "participating" States, since submission of the SEA survey is required of all grantees participating in the SEA Program of DOEd's OBEMLA.

1994,[463] the Nation's elementary and secondary schools enrolled approximately 2.80 million students from language minority backgrounds who had limited English proficiency, up from 2.56 million students in the previous year (or a 10 percent increase).[464] Overall, from 1984[465] (when the Nation enrolled 1.3 million limited-English-proficient students[466]) to 1994, the LEP population in the Nation's schools grew by 115 percent.

Statewide Comparisons of the Limited-English-Proficient Student Population

The enrollment in the Nation's schools of LEP students varies by State. In the 1990s overall, 59 percent of LEP students resided in the West census region.[467] Twenty percent of LEP students resided in the South census region, while 13 percent and 8 percent lived in the Northeast and North Central regions, respectively.[468]

In 1993–1994, California reported by far the largest number of LEP students (1.2 million students). California accounted for about 42 percent of the U.S. total LEP student enrollment.[469] Texas had the second largest number of LEP students with 422,700, followed by New York with more than 216,000 students.[470] Florida and Illinois also had sizable LEP enrollments, with 144,731 and 99,637 kindergarten through 12th graders, respectively.[471] In 1993–1994, these five States accounted for 75 percent of the Nation's students with limited English proficiency, the same share that they accounted for in 1990–1991,[472] 1991–1992, and 1993–1994.[473] The five largest LEP student population States have been consistently in this position, at least throughout the 1990s. One possible explanation is that these States are the Nation's population centers and major port-of-entry States—those in which immigrants first enter the United States.[474]

Between 1990–1991 and 1993–1994, the statewide average (including the District of Columbia) increase in the number of identified LEP students was 29 percent, ranging from under 4 percent in Massachusetts to 206 percent in Alabama.[475] During this period, six States had increases of more than 100 percent in the number of LEP students: Alabama, Alaska, Arkansas, Nebraska, North Carolina, and Oregon.[476] During the 4-year period of analysis, more than 25 percent of the States had increases of more than 50 percent.

Although the population of California's LEP students grew by only 23 percent between 1990–1991 and 1993–1994 (below the Nation's 29 percent average), the State still added the highest number of such students to the Nation's LEP population.[477] Other States that added a significant number of LEP students were Texas (with over 100,000 students), Florida (about 60,000 students), and New York (48,240 students).[478]

Between 1990–1991 and 1993–1994, only six States reported decreases in their LEP enrollment, with the most sizable (25 percent, or 2,068 students) occurring in Louisiana.[479] Other States with decreases in their LEP populations between 1990–1991 and 1993–1994 included Delaware and New Hampshire—States with relatively low (under 2,000 students) LEP enrollments.[480]

However, the reported count is not a national total of LEP students for several reasons. First, in any given year, several SEAs do not participate in the SEA program and therefore do not report on the LEP students who reside in those States. In addition, some State grantees may undercount their LEP students. Third, LEP students attending private institutions are consistently undercounted. In 1993-1994, Pennsylvania, Virginia, West Virginia, and 2 territories did not participate in the SEA program. *See* Development Associates, Inc., *Summary of Bilingual Education: State Educational Agency Program Survey of States' Limited English Proficient Persons and Available Educational Services: 1993-1994*, September 1995, p. iii (hereafter cited as *Summary of Bilingual Education SEA Program Survey*).

[463]The year 1993–1994 is the most recent data on the size of the LEP population in the Nation's schools.

[464]B. Donly et al. *Summary of Bilingual Education: State Educational Agency Program Survey of States' Limited English Proficient Persons and Available Educational Services: 1993–1994* (Arlington, VA: Development Associates, September 1995), p. 11 (hereafter cited as Donly, *LEP Trends*).

[465]The year 1984–1985 is the first year of national data on the LEP population.

[466]DOEd, *1993–1994 Biennial Report*, p. 201–02.

[467]Fleischman and Hopstock, *Descriptive Study*, p. 3.

[468]Ibid.

[469]*See* table 4.17. The year 1993–1994 is the most recent year of State LEP totals.

[470]*See* table 4.17.

[471]*See* table 4.17.

[472]The year 1990–1991 is the first year of State-level data on LEP students.

[473]*See* table 4.17.

[474]DOEd, *Condition of Bilingual Education*, p. 31.

[475]*See* table 4.17.

[476]*See* table 4.17.

[477]*See* table 4.17.

[478]*See* table 4.17.

[479]*See* table 4.17.

[480]*See* table 4.17.

TABLE 4.17
Number of Identified Students with Limited English Proficiency: 1990–1991, 1991–1992, 1992–1993, and 1993–1994

Numbers of children and youth

	1990–1991	1991–1992	1992–1993	1993–1994
AL	1,052	1,671	2,332	3,214
AK	11,184	12,056	13,489	26,812
AZ	65,727	75,941	83,843	95,011
AR	2,000	N/A	3,423	4,002
CA	986,462	1,078,705	1,151,819	1,215,218
CO	17,187	25,025	24,876	26,203
CT	16,988	16,703	17,637	21,020
DE	1,969	2,086	1,847	1,584
DC	3,359	3,555	5,132	4,498
FL	83,937	97,288	130,131	144,731
GA	6,921	7,955	10,043	11,877
HA	9,730	10,433	11,251	11,761
ID	3,986	4,980	4,616	6,883
IL	79,291	87,178	94,471	99,637
IN	4,670	4,822	5,017	5,342
IA	3,705	4,417	4,556	5,343
KS	4,661	6,180	6,900	6,900
KY	N/A	1,544	1,738	2,207
LA	8,345	9,040	5,890	6,277
ME	1,983	1,770	1,820	1,886
MD	12,701	12,580	12,719	14,336
MA	42,606	42,912	45,405	44,094
MI	37,112	36,720	37,272	45,163
MN	13,204	15,769	17,979	20,108
MS	2,753	3,058	3,222	3,259
MO	3,815	4,350	4,365	4,765
MT	6,635	6,824	7,817	8,265
NE	1,257	1,856	2,623	3,714
NV	9,057	10,735	12,040	14,370
NH	1,146	1,135	1,004	1,126
NJ	50,770	47,515	49,627	53,161
NM	73,505	64,307	83,771	79,829
NY	168,208	184,857	194,593	216,448
NC	6,030	7,026	8,900	12,428
ND	7,187	9,579	8,652	9,400
OH	8,992	11,172	11,125	12,627
OK	15,860	17,705	19,714	26,653
OR	7,557	12,605	16,359	19,651
PA	N/A	N/A	N/A	N/A
RI	7,632	8,142	8,350	8,529
SC	N/A	1,466	1,594	2,036
SD	6,691	8,961	8,197	5,438

(continued)

TABLE 4.17 (continued)
Number of Identified Students with Limited English Proficiency: 1990–1991, 1991–1992, 1992–1993, and 1993–1994

Numbers of children and youth

	1990–1991	1991–1992	1992–1993	1993–1994
TN	3,660	2,636	2,770	3,533
TX	313,234	331,869	344,915	422,677
UT	14,860	23,589	24,447	21,364
VT	500	580	723	859
VA	N/A	N/A	N/A	N/A
WA	28,646	34,314	32,858	30,627
WV	231	N/A	N/A	N/A
WI	14,648	15,159	14,788	17,677
WY	1,919	1,996	2,027	2,013
US total	2,173,573	2,370,775	2,558,487	2,804,556

Source: Development Associates, Inc., *Summary of Bilingual Education: State Educational Agency Program Survey of States' Limited English Proficient Persons and Available Educational Services: 1993-1994* (Arlington, Virginia: Development Associates, September 1995), p. 11.

Limited-English-Proficient Students as Percentage of Total Public School Enrollment

In the 1993–1994[481] school year, the (estimated) 2.8 million students with limited English proficiency accounted for approximately 5.1 percent of total public school enrollment.[482] The western and southwestern States generally have higher proportions of LEP students than do States in other regions of the country. LEP students had their highest shares of total public school enrollment in California, Arizona, and Texas (19.2, 10.4, and 9.7 percent respectively).[483] Similarly, New Mexico and Alaska reported student enrollments that were 9.4 and 7.8 percent LEP, respectively.[484]

Several Eastern States also reported high proportions of LEP students for the 1993–1994 school year, such as New York (7.7 percent), Florida (5.9 percent), and New Jersey (4.6 percent).[485] Relatively high proportions of LEP students could be at least partially attributable to an influx of immigrants (mostly from Spanish-speaking countries) and of refugees from Southeast Asia and a high birthrate among language minority families.[486] More than 50 percent of the States reported LEP enrollments less than 4 percent; and about 30 percent had LEP enrollments below 1 percent.[487]

Demographic Characteristics of LEP Students

Not all LEP students are immigrants or recent arrivals.[488] Forty-one percent of LEPs in elementary school were born in United States, as were 21 and 13 percent of middle and high school LEP students, respectively.[489] In contrast, fewer than 18 percent of elementary school LEP students were born outside of and had lived in the United States less than a year, compared to 24 percent and 27 percent of middle school and high school LEP students.[490]

The LEP population represents significant linguistic, cultural, and ethnic diversity. In the California public schools alone, almost 100 languages are represented.[491] Although LEP students speak a variety of languages, Spanish dominates as the tongue of 73 percent of LEP students.[492] The next largest groups were Vietnamese, Hmong, Cantonese, Cambodian, and Korean.[493] LEP students whose primary language was a Native American language (about 29 distinct languages) represented 2.5 percent of all LEP students in the United States.[494] The socioeconomic status of LEP students is lower than that of the general school population, as measured by their eligibility for free or reduced price school lunches.[495] Overall, 77 percent of LEP students were eligible for free or reduced price school lunches, in contrast with only 38 percent of all students in the same schools.[496] Students with limited English proficiency are disproportionately represented in schools with high concentrations of impoverished children.[497] The proportion of LEP 1st grade students in high poverty schools (22 percent) is three times the proportion found in low poverty schools (7 percent).[498]

English Language Instructional Programs

As schools undertake to serve increasingly diverse student bodies, school systems across the United States must provide services for children from linguistic minority backgrounds who also are limited English proficient, to address their specific language education and instructional needs and priorities.[499] State legislation and policy vary considerably across the Nation in terms of requirements for special instructional services for LEP students.[500] For instance, 22 State education agencies require their respective localities to provide instruction in English language arts (English as a second language), while 17 also require instruction in content areas using the students' native language (bilingual education).[501] State education agencies that do not specifically *require* their respective localities to provide particular special services encourage or promote services such as ESL, bilingual education, as well as additional programs.[502]

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[481]The year 1993–1994 is the only year of data on the proportion of LEP students (relative to total school enrollment) in each State.
[482]DOEd, *1993–1994 Statistical Profile*, table 2.3.
[483]DOEd, *1993–1994 Statistical Profile*, table A3.
[484]DOEd, *1993–1994 Statistical Profile*, table A3. *See* table 4.18.
[485]DOEd, *1993–1994 Statistical Profile*, table A3.
[486]DOEd, *Condition of Bilingual Education*, p. 32.
[487]*See* table 4.18.
[488]Fleischman and Hopstock, *Descriptive Study*, p. 6.
[489]Ibid., p. 12.
[490]Ibid.
[491]DOEd, *Condition of Bilingual Education*, p. 25.
[492]Fleischman and Hopstock, *Descriptive Study*, p. 5.
[493]*See* table 4.19.
[494]Fleischman and Hopstock, *Descriptive Study*, p. 5.
[495]Ibid.
[496]Ibid.
[497]DOEd, *1993–1994 Biennial Report*, p. 201–01. The concept "high concentration of impoverished children" was not defined.
[498]Ibid., p. 201–02.
[499]DOEd, *Education 1994*, p. 130.
[500]Fleischman and Hopstock, *Descriptive Study*, p. 21.
[501]Ibid.
[502]Ibid. Additional programs to address the instructional and language education needs and priorities of linguistic minorities include structured English immersion, sheltered English, double immersion, and other programs. For additional information on programs, *see* DOEd, *Condition of Bilingual Education*, pp. 39–

TABLE 4.18
Percentage of Public School Students Who Are Limited English Proficient, by State: 1993–1994

State	Percentage LEP	State	Percentage LEP	State	Percentage LEP
Total	5.1	KY	–	OH	0.7
AL	0.1	LA	0.7	OK	2.8
AK	7.8	ME	0.4	OR	2.6
AZ	10.4	MD	1.2	PA	0.9
AR	0.3	MA	4.3	RI	5.6
CA	19.2	MI	1.3	SC	0.3
CO	2.8	MN	2.5	SD	–
CT	3.0	MS	0.6	TN	0.3
DE	1.1	MO	0.5	TX	9.7
DC	–	MT	2.9	UT	1.3
FL	5.9	NE	–	VT	–
GA	0.9	NV	5.8	VA	1.2
HA	6.7	NH	0.3	WA	4.1
ID	2.2	NJ	4.6	WV	–
IL	3.1	NM	9.4	WI	1.1
IN	0.4	NY	7.7	WY	0.6
IA	0.9	NC	1.3		
KS	1.1	ND	1.9		

Source: U.S. Department of Education, National Center for Education Statistics, *1993-1994 Schools and Staffing Survey: Statistical Profile,* by Robin Henke et al. (Washington, D.C.: Government Printing Office, 1996), table A3. States with "–" had too few LEP students in the sample to determine the LEP percentage of total school enrollment. Note: The symbol "–" indicates that there are too few cases in the State sample to estimate the percentage of students who are limited English proficient.

TABLE 4.19
Distribution of Languages Spoken by Students with Limited English Proficiency: 1991–1992

Language groups	Percentage of LEP students	Language groups	Percentage of LEP students
Spanish	72.9	Creole (French)	0.9
Vietnamese	3.9	Arabic	0.9
Hmong	1.8	Portuguese	0.7
Cantonese	1.7	Japanese	0.6
Cambodian	1.6	Armenian	0.5
Korean	1.6	Chinese (unspec.)	0.5
Laotian	1.3	Mandarin	0.5
Navajo	1.3	Farsi	0.4
Tagalog	1.1	Hindi	0.3
Russian	0.9	Polish	0.3

Source: U.S. Department of Education, Office of the Under Secretary, *Descriptive Study of Services to Limited English Proficient Students*: Summary of Findings and Conclusions, by Howard Fleischman and Paul Hopstock (Arlington, Virginia: Development Associates, Inc., 1993), p. 11.

Language Acquisition Classes

In the 1987–1988 school year, 34.4 percent and 20.0 percent of public elementary and secondary schools offered ESL and bilingual education programs, respectively.[503] Three years later, during the 1990–1991 school year, ESL programs and bilingual education were offered in 40.8 percent and 18.8 percent of public schools, respectively.[504] By 1993–1994, 42.7 and 17.8 percent of public schools had ESL and bilingual education programs available for limited-English-proficient students.[505] In 1993–1994, 52 percent and 23 percent of the Nation's public school students attended schools that offered ESL and bilingual education, respectively.[506]

Language Education Provided to the Nation's Students

In 1993–1994, English acquisition classes reached numerous students attending the Nation's public schools. More students received instruction in ESL than bilingual education.[507] Approximately 3 percent (1.28 million students) and 4 percent (1.65 million students) of public school students participated in bilingual education and ESL classes, respectively.[508]

More students were served at the elementary than the secondary school level. Almost 4 percent of elementary students (1.07 million) and 5 percent (1.27 million) received bilingual education and ESL services.[509] At the secondary level, approximately 1 percent (191,233 students) and 3 percent (354,951 students) participated in bilingual education and ESL classes, respectively.[510]

Language Education Provided to Students with Limited English Proficiency

Based on the results of a survey disseminated to local school districts for the 1990–1991 school year,[511] approximately 93 percent of LEP students receive some type of special instructional service.[512] This may range from full-day specialized instruction to a single period pull-out class.[513] Seventy-seven percent of LEP students received specialized instruction in English, while almost 39 percent received language arts in their native language.[514] At the elementary school level, almost 50 percent of students received at least some English-language instruction in their native language, compared to under 30 percent for secondary school students.[515] The types of language education and instructional services provided to limited-English-proficient children depend primarily on local conditions and available school district resources, and not exclusively on the pupil's academic and language acquisition needs and priorities.[516]

Beneficiaries of Federally Funded Programs to Educate Linguistically and Culturally Diverse Students

Most funding for LEP instruction comes from States' and school districts' general funds.[517] However, the Federal Government provides financial support in the form of grants to local school districts, so that they may implement and expand programs that address the English-language educational needs of language minority students.[518] Hence, Federal, and both State and local policymakers must have reliable information on the number of students who need English-language assistance to allocate adequate funding for services and for monitoring their effectiveness.[519]

The Office of Bilingual Education and Minority Languages Affairs (OBEMLA) is authorized to administer Title VII programs under the Bilingual

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53; Center on Evaluation, Development, Research, *Bilingual Education*, pp. 249–68; and Lau Team, *Serving LEPs*.

[503]DOEd, *Schools and Staffing in the United States: A Statistical Profile, 1990–1991* (Washington, DC: Government Printing Office, July 1993), p. 25.

[504]Ibid.

[505]DOEd, *1993–1994 Statistical Profile*, table 2.4.

[506]DOEd, *Education 1995*, p. 342.

[507]Students may participate in more than one program or service. *See* DOEd, *1995 Digest*, p. 70.

[508]DOEd, *1995 Digest*, p. 70.

[509]Ibid.

[510]Ibid.

[511]The year 1990–1991 is the most recent year of available data LEP students' participation in English skills classes.

[512]Fleischman and Hopstock, *Descriptive Study*, p. 22. The instruction provided may or may not have been restricted to LEP students, depending on school policy. *See* Fleischman and Hopstock, *Descriptive Study*, p. 24. That is, data on the Nation's recipients of English-language acquisition classes (such as ESL and bilingual education) do not specifically state the number of LEP students being served.

[513]Ibid., p. 29.

[514]Ibid.

[515]Ibid., p. 22.

[516]National Association for Bilingual Education, *Questions and Answers on Bilingual Education* (Washington, DC: January 1993), p. 5 (hereafter cited as NABE, *Q and A*).

[517]DOEd, *Condition of Bilingual Education*, p. 47, and Kris Anstrom, *Defining the Limited English Proficient Population* (Washington, DC: National Council on Bilingual Education, June 1996), p. 2 (hereafter cited as Anstrom, *LEP Population*).

[518]U.S. Department of Education, Office of Bilingual Education and Minority Affairs, "Educating Linguistically and Culturally Diverse Students," no date, brochure.

[519]Anstrom, *LEP Population*, p. 2.

Education Act.[520] Between FY 1988[521] and FY 1992,[522] various Title VII, part A, grants were administered on a competitive basis to school districts and other educational agencies for classroom instruction projects that would enable LEP students to achieve English competence and to meet grade promotion and graduation requirements.[523] Three particular programs that served LEP students were:

Transitional bilingual education: A program that uses the LEP students' native languages and English to provide an instructional program to achieve English proficiency.[524] Generally, the LEP child is initially taught reading in English and the native language, while other subjects are taught in the native language until the student has sufficient competency in English to receive subject instruction in English.[525]

Special alternative instruction: Programs that do not require use of the LEP child's native language, since English as a second language (ESL) and immersion are typically utilized.[526]

Developmental bilingual education: Full-time programs that provide a balance of English- and native-language instruction (i.e., equal emphasis on English and native languages).[527]

(Limited-English-proficient children were not permitted to remain in a transitional or special alternative project for more than 5 years.)[528]

Transitional bilingual education projects, and others that used the LEP children's native language, were mandated to receive at least 75 percent of the Title VII, part A, appropriations.[529] Between 1970 and 1980, Title VII, part A, funding to States for local education programs increased from $21 million to $112 million, reaching $132 million by 1995.[530]

Between 1988 and 1992, the number of children served by transitional bilingual education projects fluctuated, while there was significant growth in the other two grant programs during this period.[531] However, transitional bilingual education projects accounted for the most LEP students. In 1992 more than 224,000 of the total 315,000 LEP students who were beneficiaries of the three Title VII, part A, programs participated in transitional bilingual education.[532] In addition, in 1991–1992, 10 percent more LEP students benefited from federally funded transitional bilingual education than 4 years earlier.[533]

The number of children and youth participating in federally funded developmental bilingual education increased more significantly (approximately 1,000 percent) than in the other two English skills programs.[534] The number of beneficiaries for special alternative projects increased consistently between 1988 and 1992.[535] By 1992 there were more than six times as many beneficiaries (86,000 students) in the Nation as there were in 1988 (14,230 students).[536]

Overall, in the late 1980s and early 1990s, 9.6 percent of limited-English-proficient students participated in federally funded services, while 72.7 percent participated in programs that were funded by States and localities.[537] In the 1990–1991 school year,[538] 1.6 million identified LEP students were served in programs that were funded by State and/or local appropriations, while fewer than 260,000 (with 50 percent in California) were served in instructional programs sponsored by OBEMLA grants to local districts.[539] By 1993–1994,[540] slightly more than 352,000 LEP students (about 12 percent of the 2.8

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[520]DOEd, *Condition of Bilingual Education* , p. 62.

[521]The year 1987–1988 is the first year of data on LEP students as OBEMLA beneficiaries.

[522]The year 1991–1992 is the most recent year of available data on LEP students as beneficiaries of federal (OBEMLA, specifically) grants.

[523]DOEd, *Condition of Bilingual Education*, pp. 62–63.

[524]DOEd, *Condition of Bilingual Education*, p. 63.

[525]Steven Aleman, *Bilingual Education Act: Background and Reauthorization Issues* (Washington, DC: Congressional Research Service, January 1993), p. 6 (hereafter cited as Aleman, *BEA*).

[526]Aleman, *BEA*, p. 8.

[527]DOEd, *Condition of Bilingual Education*, p. 64.

[528]Aleman, *BEA*, p. 6.

[529]Aleman, *BEA*, p. 6.

[530]Anneka Kindler, *Title VII Funding to States and Territories from FY69 to FY95* (Washington, DC: National Council on Bilingual Education, July 1996), p. 61. For a thorough discussion of OBEMLA funds for services provided to LEP students and other funding levels of programs for students with limited English proficiency, see chap. 3, which also provides information on OBEMLA's (proposed) four functional discretionary grant categories aligned with DOEd's comprehensive educational reform efforts.

[531]*See* table 4.20.

[532]*See* table 4.20.

[533]*See* table 4.20.

[534]*See* table 4.20.

[535]*See* table 4.20.

[536]Aleman, *BEA*, p. 9.

[537]Fleischman and Hopstock, *Descriptive Study*, p. 30.

[538]The year 1990–1991 is the first year of available data that compares *numbers* of LEP beneficiaries of Federal to State/local programs.

[539]DOEd, *Condition of Bilingual Education*, p. 20.

[540]The year 1993–1994 is the most recent year of available data that compares numbers of LEP beneficiaries of Federal to State/local programs.

TABLE 4.20
Number of Beneficiaries for Federal Title VIIA Programs, by Year

	FY 1988	FY 1989	FY 1990	FY 1991	FY 1992
Transitional bilingual education	202,546	194,469	226,000	209,918	224,400
Developmental bilingual education	450	254	2,731	3,320	4,600
Special alternative instruction	14,230	36,579	45,570	62,178	86,000

Source: Steven Aleman, *Bilingual Education Act: Background and Reauthorization Issues* (Washington, D.C.: Congressional Research Service, January 1993), pp. 7–9.

million LEP school enrollment[541]) were provided with services through the Federal Government's Title VII-funded programs.[542] State and local bilingual education programs enrolled 1.4 million students, while ESL-only programs enrolled 757,000 LEP students.[543]

Teachers of Students with Limited English Proficiency

In 1990–1991, 18,609 elementary and 12,767 secondary school teachers reported that they instructed courses in bilingual education or ESL as their primary assignments (the field in which they teach the most classes).[544] By 1993–1994, there were 27,414 and 12,425 elementary and secondary teachers for English skills classes.[545] In 1993–1994, approximately 25 percent of schools had vacancies in ESL and/or bilingual education.[546] Of the Nation's schools with vacancies in multiple fields (e.g., general elementary, special education, foreign language, mathematics), vacancies in ESL/bilingual education were reported as the most difficult (if not impossible) to fill.[547]

Many States and school districts have established formal qualifications for teachers working in a program for limited-English-proficient students.[548] For a bilingual education program provided to LEP students, at a minimum, teachers should be able to speak, read, and write both languages and have received adequate instruction to show that they have these skills.[549] In contrast, teachers of ESL programs do not need to be bilingual, and they can be trained in their instructional methods through inservice training, formal college coursework, or a combination of the two.[550]

Large numbers of public school teachers who are not specialists instruct at least one LEP student in grades K–12 who are not specialists; they teach classes containing mostly English-proficient students along with some LEP students.[551] Based on the results of the 1990–1991 survey mentioned above,[552] 15 percent of all public school teachers had at least one LEP student in their classroom.[553] Of teachers who served at least one LEP student, 66 percent had some (but not a majority) LEP students in their classes, while 18 percent of the teachers instructed classes composed mostly of LEP students.[554] The remaining 16 percent taught specialized classes such as ESL or bilingual education.[555]

More than 90 percent of the teachers were white (Hispanic and non-Hispanic), and 4 percent were black.[556] Schoolteachers of LEP students had an average of 7 years teaching LEP students (compared to 12 years of teaching overall).[557] Most teachers of LEP students held regular elementary (58 percent) and secondary level (40 percent) teaching certifications; only 10 percent and 9 percent also held certification in bilingual education and ESL, respectively.[558] Almost 45 percent of teachers held at least a master's degree.[559]

English is used by teachers for most of the instruction of LEP students.[560] However, 42 percent of teachers of LEP students reported that they spoke a non-English language that was also the native language of at least one of their LEP students.[561] Most teachers (and sometimes with the use of classroom aides) reported that they modified (adapted or simplified) their instructional methods and the English they used to make it more understandable to LEP students.[562]

Achievement and Attainment of Students with Limited English Proficiency

Limited-English-Proficient Students' Enrollment in School

Language minority children who speak English "with difficulty" were less likely than English speakers to be enrolled in school at all levels. For instance,

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[541]*See* table 4.17.

[542]Anstrom, *LEP Population*, p. 2.

[543]Donly, *LEP Trends*, p. vi. According to the National Association of Bilingual Education, State and local monies continuously account for the preponderance of services to LEP students. Their view is that the Nation does not possess sufficient personnel resources necessary to undertake the education of these students. *See* NABE, Q and A., p. 6.

[544]DOEd, *Schools and Staffing in the United States: A Statistical Profile, 1990–1991* (Washington, DC: Government Printing Office, July 1993), p. 52. The document combines the number of ESL and bilingual education teachers.

[545]DOEd, *1993–1994 Statistical Profile*, table 4.1.

[546]Ibid., table 7.3a.

[547]Ibid., table 1.5.

[548]*See* C.F.R. §100.3(b)(ii).

[549]*See* Keyes, 576 F. Supp. at 1516–17.

[550]Michael Williams, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited English Proficiency (LEP Students)," Sept. 27, 1991, pp. 4–5.

[551]Fleischman and Hopstock, *Descriptive Study*, p. 39.

[552]The year 1990–1991 is most recent year on details about educators of LEP students.

[553]Fleischman and Hopstock, *Descriptive Study*, p. 39.

[554]Ibid., p. 43.

[555]Ibid.

[556]Ibid., p. 39.

[557]Ibid., p. 44.

[558]Ibid., p. 46.

[559]Ibid., p. 45.

[560]Ibid., p. 40.

[561]Ibid., p. 47.

[562]Ibid., p. 40.

among 5- to 14-year-olds, approximately 93 percent of both students whose only home language is English and language minority students who speak English very well were enrolled in school, compared to 89 percent of their peers who spoke English with difficulty.[563] By high school, the gap between English speakers and non-speakers increased. More than 90 percent of English speakers between the ages of 15 and 17 (93 percent of students whose only home language is English and 92 percent of language minority students who speak English very well) were enrolled in school compared to less than 84 percent of native English speakers, bilinguals, and language minority students who spoke English with difficulty, respectively, were enrolled in school.[564]

By the time they reach age 18, youth with difficulty speaking English are very likely not to be enrolled in school: in 1990 only 54 percent of 18 and 19 year-olds in this group were enrolled.[565] In contrast, 70 percent of the bilinguals and 66 percent of monolinguals were enrolled.[566] Many still-in-school 18 to 19 year-olds were enrolled in college.[567]

Examining Achievement of Students with Limited English Proficiency in Core Subjects

The basic goal of all special programs for LEP students is to address their instructional and language education needs and priorities, and prepare them for successful competition in the English-speaking classroom.[568] National norms show how English-speaking students are achieving on standardized tests and on other indicators of performance and attainment. If a former LEP student can remain on par with the norms each year, he or she is considered to be successfully competing in the English-language environment, because he or she makes as much progress as do comparable English-speaking students.[569]

According to DoEd, LEP students are represented disproportionately among low achievers.[570] LEP students were three times more likely to be low achievers than high achievers.[571] Among students who score below the 35th percentile on nationally normed achievement tests, about 13 percent of the 1st and 3rd grade cohorts, and about 6 percent of the lowest achievers[572] in the 7th grade are classified as LEP. However, fewer than 3 percent of high achieving[573] 1st graders were LEP, and the proportion was lower for 3rd and 7th graders.[574]

Ingrade Retention Experiences by LEP Students

Students with limited English proficiency are considered to be educationally disadvantaged, especially in the upper grades. About 20 percent of LEP students at the middle school level, compared to 9 percent of all students, were enrolled in a grade level at least 2 years behind the average school grade for their age group.[575] At the high school level, almost 27 percent of LEP students are assigned to grade levels at least 2 years lower than age/grade norms, compared to 11 percent of all students.[576]

According to DOEd, students with limited English proficiency are more likely than others to repeat grades in school: 30 percent of LEP students were retained in at least one grade, compared with only 17 percent of their native-English-speaking peers.[577]

High School Completion and Dropout Rates of Students with Limited English Proficiency

In 1992, overall, 11 percent of 16- to 24 year-olds were not enrolled in high school even though they had not graduated.[578] About 9 percent of 16- to 24-year-old students whose only home language is English were dropouts, compared to 22 percent of language minority students in the same age group. Language minority students who spoke English well had a high school noncompletion rate (11 percent) only slightly higher than that of their peers whose home language was English.[579] In contrast, the high school noncompletion rate for language minority students who spoke English with difficulty was almost four times as high at 40 percent.[580]

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[563]Dorothy Waggoner, ed., *Numbers and Needs: Ethnic and Linguistic Minorities in the United States*, vol. 5, no. 4 (Washington, DC: July 1995), p. 1. *See* table 4.21

[564]*See* table 4.21

[565]*See* table 4.21.

[566]*See* table 4.21.

[567]Waggoner, *Numbers and Needs*, vol. 5, no. 4, p. 1. *See* table 4.21.

[568]Center on Evaluation, Development, Research, *Bilingual Education*, p. 252.

[569]Ibid.

[570]DOEd, *1993–1994 Biennial Report*, p. 201–2. The concept of "low achiever" was not defined.

[571]DOEd, *1993–1994 Biennial Report*, p. 201–2. The concept of "high achiever" was not defined.

[572]The concept of "low achiever" was not defined.

[573]The concept of "high achiever" was not defined.

[574]DOEd, *1993–1994 Biennial Report*, p. 201–2.

[575]Fleischman and Hopstock, *Descriptive Study*, pp. 6, 13.

[576]Ibid., p. 6.

[577]NABE, *Q & A.*, p. 4.

[578]DOEd, *Education 1994*, p. 176.

[579]Ibid.

[580]Ibid.

Of students who had *not* experienced an ingrade retention, high school dropout rates were 7 percent for native English speakers and 10 percent for language minority students with facility in English.[581] The dropout rate was significantly higher (41 percent) for students who were not proficient in speaking English.[582]

Language minority students who had difficulty with English had a lower dropout rate if they *had* experienced an ingrade retention (32 percent) compared to their non-English-speaking peers who had not experienced grade retention (41 percent, as shown above).[583] For students who spoke English and had experienced at least one ingrade retention, language minority students who reported that they spoke English well had a high school dropout rate (19 percent) that was slightly lower than that of native English speakers (22 percent).[584]

Youth from different countries often bring different educational experiences with them, and they may or may not attend school in this country, depending in part upon their ages at arrival.[585] According to some members of the education community, the risk of failing to complete high school can be related, in part, to the extent to which young immigrants have mastered English before arrival or have opportunities to master it in the schools in the United States.[586] Hispanic students, in particular, are more likely to withdraw from school if their families speak little or no English at home.[587] Almost 33 percent of Hispanics from these families withdrew from high school before graduation; 14 percent of their counterparts who were more proficient in English dropped out of high school.[588]

The educational attainment of adults, age 25 or older, reflects a relatively small educational gap between native English speakers and bilinguals.[589] For instance, in 1990, 78 percent and 72 percent of native and nonnative English speakers were high school graduates.[590] In contrast, only 42 percent of language minority members with English-speaking difficulty were high school graduates.[591]

Achievement and Attainment of LEP Students After "Exiting" the English Skills Programs

Many school districts that serve LEP students do not compare their achievement levels (in areas such as reading, English language arts, mathematics, and science) with those of the general student population.[592] However, in schools that maintain achievement data on former LEP students, officials were able to determine how such students compared with their non-LEP peers.[593] Based on the results of the 1990–1991 survey mentioned above, in 53 percent of public schools, former LEP students were reported to be performing[594] at levels equal to or above their peers; in 35 percent of schools, prior LEP students were reported to be performing "somewhat below," and in 6 percent of schools, "considerably below" their peers.[595] In the remaining schools, the performance of former LEP students was mixed (i.e., some were performing above and some below their respective English-proficient peers.)[596]

Ability Grouping and Tracking Among Students

Schools are required to provide equal educational opportunity for all students, yet they also can be expected to offer a differentiated education to students so that variation in abilities, interests, learning styles, and motivational levels can be accommodated.[597] This section focuses on the extent to which ability grouping and program tracks exist in America's schools, as well as the distribution of students (based on demographic characteristics, such as race/ethnicity) among various "ability" groups and program tracks.

Despite the prevalence and importance of within-school grouping practices, no uniform definitions exist to clarify the distinctions among various types of grouping practices. Moreover, often terms that are defined specifically by one source are then used interchangeably by another.[598] For purposes of clarity in

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[581]Ibid. *See* table 4.22.
[582]*See* table 4.22.
[583]*See* table 4.22.
[584]*See* table 4.22.
[585]Waggoner, ed., *Numbers and Needs*, vol. 5, no. 1 (January 1995), p. 2.
[586]Ibid.
[587]ACE, *Minorities*, p. 9.
[588]Ibid.
[589]Waggoner, ed., *Numbers and Needs*, vol. 5, no. 4 (Washington, DC: July 1995), p. 1.
[590]Ibid.
[591]Ibid.
[592]Fleischman and Hopstock, *Descriptive Study*, p. 57.
[593]Ibid., p 58.
[594]The concept of "performing" was not explicitly defined for any grade level.
[595]Fleischman and Hopstock, *Descriptive Study*, p. 58.
[596]Ibid., p. 73.
[597]U.S. Department of Education, National Center for Education Statistics, *Curricular Differentiation in Public High Schools*, by Nancy Carey et al. (Washington, DC: December 1994), p. 1 (hereafter cited as Carey, *Differentiation*).
[598]*See* Edward L. Dejnozka and David E. Kapel, *American Educators' Encyclopedia* (New York: Greenwood Press, 1991), p. 577.

TABLE 4.21
School Enrollment Rates by Age Level of English Only Speakers and Members of Language Minorities by English Ability: 1990

		Speak non-English language at home[1]	
Ages	**Speak English only**	**Speak English very well**	**Speak English with difficulty**
5-14	92.7	93.7	89.2
15-17	92.9	92.3	83.7
18-19	65.8	70.2	53.6

Source: Dorothy Waggoner, ed., *Numbers and Needs: Ethnic and Linguistic Minorities in the United States*, vol. 5, no. 4 (Washington, D.C.: July 1995), p. 1.

[1] English proficiency is determined using responses to the question asked about those who spoke a language other than English at home: "How well does this person speak English?" Possible responses were "very well," "well," "not well," and "not at all." Persons who responded less than "very well" were classified as "speak English with difficulty." See U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1994*, by Thomas Smith et al. (Washington, D.C.: Government Printing Office, August 1994), p. 308.

TABLE 4.22
Dropout Rates[1] for 16- to 24-Year-Olds, by Student Characteristics: 1992

		Speak non-English language at home[2]		
	Speak English only	**All**	**Speak English very well**	**Speak English with difficulty**
Total[3] dropout rate	8.8	21.5	11.2	39.7
Never retained	7.1	21.3	10.2	40.5
Retained	19.5	22.3	18.9	32.1

Source: U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1994*, by Thomas Smith, et al. (Washington, D.C.: Government Printing Office, August 1994), p. 176.

[1] Percentage who are not enrolled in school and do not have a high school diploma or equivalency certificate.

[2] English proficiency is determined using responses to the question asked about those who spoke a language other than English at home: "How well does this person speak English?" Possible responses were "very well," "well," "not well," and "not at all." Persons who responded less than "very well" were classified as "speak English with difficulty." See U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1994*, by Thomas Smith, et al. (Washington, D.C.: Government Printing Office, August 1994), p. 308.

[3] Included in the total are some for whom whether they repeated a grade is unknown.

this series of reports, "within-school grouping" is used to encompass the broad range of programs and practices that divide students within a school, grade, or classroom. These include ability grouping, tracking, advanced placement programs, honors programs, gifted and talented programs, magnet programs, remedial programs, and multilevel reading or mathematics groups within a single classroom.

Ability grouping practices, the primary focus of the fourth report in this series, are equally difficult to define conclusively. In its broadest sense, ability grouping is the practice of grouping students within grade levels or classes according to their estimated capacity to learn or perform.[599] Primarily, placement in an ability group is based on one, or a combination of, the following criteria: (1) performance on intelligence tests; (2) scores on achievement tests; (3) past academic performance in the classroom; (4) teacher evaluations or recommendations; and (5) parent or student choice.[600] In some contexts, distinctions have been made between ability grouping and achievement grouping.[601] However, for the purposes of this series of reports, the Commission considers ability grouping as a practice that encompasses both ability and achievement grouping.

The term "ability grouping" often is used interchangeably with the term "tracking." However, for purposes of clarity in this series of reports, tracking is used to describe the placement of secondary education students in specific curriculum programs, such as general, vocational, business, or college preparatory.[602] Tracking is different from ability grouping in that parents and students have some choice in the programs of study. As with ability grouping, placement in tracks may be based on intelligence tests, achievement tests, past performance, teacher judgments, or a combination of these factors.

The education community usually reserves the term "tracking" or "curricular tracking" for high school programs in that *students choose*,[603] on the basis of their educational and work-related goals (e.g., academic/college preparatory, vocational, and general).[604] Unlike ability grouping, students' and parents' preferences have a role in course placement.[605]

It is critical to address the placement of students from various racial and ethnic subgroups and both genders into within-class groups in the regular classroom, separate classes, and distinct programs, in order to assess the implications of educational inequality.

General Trends in Public School Students' Course-Taking Areas

Based on data collected in two national longitudinal studies of high school students,[606] of the 24 course units

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[599]*See* Office for Civil Rights, U.S. Department of Education, *Annual Report to Congress, Fiscal Year 1991* (1992), p. 19.

[600]Joseph E. Bryson and Charles P. Bentley, *Ability Grouping of Public School Students: Legal Aspects of Classification and Tracking Methods* (Charlottesville, VA: The Michie Co., 1980), pp. 8–9, and Dejnozka and Kapel, *American Educators' Encyclopedia*, p. 577.

[601]*See* Bryson and Bentley, *Ability Grouping of Public School Students*, pp. 8–9.

[602]Ibid., p. 9; Dejnozka and Kapel, *American Educators' Encyclopedia*, p. 577.

[603]According to some researchers in the education community, even when students have a choice of tracks, in practice they are influenced by school authorities. Students and their parents can be urged by teachers, principals, and guidance counselors to make the "right" choices. *See* Adam Gamoran, "The Variable Effects of High School Tracking," *American Sociological Review*, vol. 57 (December 1992), p. 815.

[604]Kulik, *Research on the Gifted*, p. ix.

[605]Ibid.

[606]Two longitudinal studies, *High School and Beyond* (*HS&B*) and the *National Educational Longitudinal Study of 1988* (*NELS:88*) provide information on students' transcripts 10 years apart.

The first study, *High School and Beyond* is a national, multipurpose longitudinal survey of 1980 high school sophomores and seniors. It was the first NCES longitudinal study to have a sophomore cohort (rather than focus exclusively on high school seniors, which was the case with the *National Longitudinal Study of the High School Class of 1972*). The purpose of collecting data in *HS&B* on both sophomores and seniors was to permit a fuller understanding of secondary school experiences and the impact on students, as well as provide a basis to compare school dropouts to persisters.

The HS&B sample was a two-stage stratified cluster sample. DOEd, *Ten Years*, app. C, p. 2. The base year survey first selected (with equal probability) 1,015 high schools (the clusters, which were divided into public and private strata), and targeted 36 seniors and sophomores in each. Approximately 58,270 students participated (30,000 of whom were sophomores) in the survey. A sufficient number of minorities were surveyed to enable essential policy analyses. To accomplish this goal, certain types of schools were oversampled, such as those with high percentages of Hispanic students and alternative schools. Ibid., app. c, p. 1.

The instrument collected data on demographic characteristics (e.g., race/ethnicity, socioeconomic status, and parental educational attainment), family characteristics (e.g., size, composition, religious background), characteristics of schools attended (e.g., public, private, non-secular), extracurricular and employment experiences, self perception and life values (e.g., marriage, money, work success), attitudes toward learning, after school activities (e.g., hours of television watched and homework done) per week), specific course selection (e.g., remedial, regular, or honors mathematics), participation in program tracks (e.g., general, vocational, and academic/college preparatory), and plans for the future. Ibid.

earned by high school graduates in 1992 (up from 21 in 1982), 17 were in academic subjects[607] (up from 14 in 1982), 4 in vocational subjects (down from 5 in 1982) and 3 in personal-use.[608] With respect to academic subjects, whites, blacks, and Hispanics earned more units than their counterparts in 1982.[609] Hispanics showed the largest increase, from 13 to 17 units.[610] Females showed a greater increase (from 14 to 18 units) than did males (14 to 17) in core academic areas.[611]

In contrast, the number of vocational units earned by all three racial/ethnic subgroups (and both genders) decreased, with the largest decline occurring among the Hispanic population (from 5.3 to 3.8 units).[612] Males and females showed similar changes from 1982 in their vocational course taking.[613]

Curricular/Program Tracking

The term "tracking" typically is used to refer to between-class homogeneous groupings of students, reflecting the program differentiation in high schools.[614] The theory among some members of the education community is that students will learn best when the instructional content or curriculum is matched well to the diverse student needs and interests found in the Nation's schools.[615] Tracking in the American high school acts as an allocation mechanism that sorts students into vocational, academic, and general education programs.[616]

Students' academic experiences can vary considerably depending upon the program in which they are enrolled.[617] In addition to differences in the sequence and content of courses, differences have been noted among programs in terms of teachers' experience, education, and expectations of student performance.[618] Vocational programs are designed to develop specific occupational skills that lead to direct entry into the labor market.[619] Specifically, vocational education is a

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The first followup to HS&B collected transcript information for 1982. As part of the first followup survey, transcripts were requested from a probability subsample of 18,152 students from the original sophomore cohort, and overall 12,116 records were reviewed. Ibid., app. B, p. 11.

The second study is the *1992 Transcript Study*, which was part of the second (1992) follow-up to the *NELS:88*. *NELS:88* is considered the most comprehensive longitudinal study conducted to date by the National Center for Education Statistics. U.S. Department of Education, National Center for Education Statistics, *National Education Longitudinal Study of 1988: A Profile of the American 8th Grader: NELS:88 Student Descriptive Summary* by Anne Hafner et al. (Washington, D.C: June 1990), p. B-4. The purpose of the study was to provide trend data about critical transitions experienced by young people as they develop, attend school, and begin their careers. The resulting information is used to supplement data on the impact of school policies, teacher practices, and family involvement on student outcomes (i.e., academic achievement, persistence in school, and participation in postsecondary education). DOEd, *Condition of Education 1996*, p. 343. The base year study included a student questionnaire and four cognitive tests; a parent survey; a teacher survey; and school administrator survey.

The *1992 NELS:88* survey revisited the same sample of students initially surveyed in 1988. DOEd, *Digest of Education Statistics 1995*, p. 483. In addition, the sample was "freshened" with 1992 seniors who were not high school sophomores in the 1989-1990 school year in United States. These students are included so that the *1992 NELS:88* would be representative of the Nation's high school senior class. U.S. Department of Education, National Center for Education Statistics, *A Profile of the American High School Senior in 1992*, by Patricia Green et al. (Washington, D.C.: Government Printing Office, June 1995), p. 34.

[607]Academic courses include mathematics (e.g., basic, prealgebra, advanced calculus); science (e.g., general biology, physics); English (e.g., literature, composition, speech); social studies (e.g., American government, European history); fine arts; and foreign languages. Vocational courses include consumer and homemaking education; general labor market preparation (e.g., typewriting, career exploration); and specific labor market preparation (e.g., classes in business and health occupations). Personal use classes focus on areas such as health care, religion, and military science. *See* DOEd, *Education 1994*, p. 239.

[608]Ibid., p. 72.

[609]Ibid.

[610]Ibid.

[611]Ibid.

[612]Ibid.

[613]DOEd, *Education 1994*, p. 238.

[614]Jomills Braddock II, *Tracking: Implications for Student Race-Ethnic Subgroups: Report No. 1* (Baltimore, MD: Johns Hopkins University Center for Effective Schooling for Disadvantaged Students, February 1990), p. 1 (hereafter cited as Braddock, *Tracking Implications*).

[615]Ibid.

[616]Ibid. In addition to students' differential preferences, motivations, capacities, abilities, etc. affecting their assignment, enrollment, or placement in a particular program track, other factors can intercede or affect this process, such as declining enrollments (which may reduce the hiring of teachers in certain subject areas) and demographic shifts (which can lead to fewer resources), staff expertise, counselor load, and other factors that can affect schools in unpredictable ways and interfere with their best efforts to make and carry out rational decisions. *See* Jeannie Oakes et at. *Educational Matchmaking: Academic and Vocational Tracking in Comprehensive High Schools* (Berkeley, CA: National Center for Research in Vocational Education, 1992), pp. 32–37.

[617]U.S. Department of Education, National Center for Education Statistics, *A Profile of the American High School Senior in 1992*, by Patricia Green et al. (Washington, DC: Government Printing Office, June 1995), p. 34 (hereafter cited as DOEd, *1992 Profile*).

[618]Ibid.

[619]Braddock, *Tracking Implications*, p. 2.

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curricular track that has organized instructional programs, services, and activities directly related to the preparation of individuals for paid or unpaid employment or for additional preparation for a career requiring other than a baccalaureate or advanced degree.[620]

In contrast, academic programs intend to develop the more advanced scholastic/cognitive skills and knowledge that are prerequisites for postsecondary schooling before labor force entry.[621] General education (a hybrid of the academic and vocational tracks) tracks lack the clear specialized focus of either the vocational or college preparatory curriculum, and can often serve as a "holding pen" before students leave high school.[622]

The differentiation of the high school curriculum into the academic, general, and vocational tracks is intended to meet the diverse aspirations, preferences, interests, capacities, and motivations of different student groups.[623] One of the most consistent influences on high school students is the program in which they are placed or enroll, as students' opportunities to learn are directly related to their course and track placements. In addition, the curriculum that students undertake strongly influences their later occupational opportunities and prospects for entry into and success in postsecondary education and the labor force.[624] Since a particular program track can shape a student's post high school decisions, labor market behavior, and other experiences, then tracking (and educational stratification overall) can affect the well-being of the Nation's economy.[625]

Renewed Emphasis on Academic Program Track

The proportion of students in the academic/college preparatory, general, and vocational programs varies over time.[626] In terms of college preparatory programs, the school reform agenda of the 1980s reacted against the program placement trends of the 1970s, in which placement in the academic curriculum declined (for both genders and all racial/ethnic groups), with concomitant increases in general program and (especially for males) vocational program placement.[627] The school reform effort of the 1980s placed renewed emphasis on the academic curriculum, as general and vocational tracks were increasingly criticized for their lack of rigor in imparting the most "socially-valued form of knowledge." Since 1980 program placement patterns across various tracks have changed to reflect a "back to basics" movement.[628]

The data presented below for high school sophomores and seniors allow two aspects of tracking to be examined: (1) the recent status of tracking (1990 for high school sophomores and 1992 for seniors) and the dissimilar distribution among the various racial/ethnic and gender subgroups; and (2) trends in curriculum program tracking during a 10-year period (from 1980 to 1990) for high school sophomores and a 20-year period (from 1972 to 1992) for high school seniors.

High School Sophomores.[629] Compared to their 1980 counterparts, fewer 1990 high school sophomores reported that they were in vocational programs (8 percent compared to 21 percent).[630] Also, the drop in vocational program placement was consistent for sophomores of both genders.[631] Accompanying the decline in vocational program placement was an increase in placement in a college preparatory/academic program track. Between 1980 and 1990, the participation rate grew from 33 to 41 percent of students.[632] Although expected to decrease, program placement in the general curriculum increased slightly (46 to 51 percent of all students).[633] The proportion of white sophomores in the academic track increased from 35 to 42 percent.[634] The participation of black sophomores increased even more, from 26 percent in 1980 to 41 percent in 1990. As a result, the 9 percentage point gap in participation in college preparatory programs between whites and blacks was virtually eliminated.[635] The participation in the academic track by Hispanic students increased from 25 percent in 1980 to 35 percent in 1990, decreasing the gap with white students

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[620]DOEd, *Education 1995*, p. 498.
[621]Braddock, *Tracking Implications*, p. 2.
[622]Ibid.
[623]U.S. Department of Education, National Center for Education Statistics, *America's High School Sophomores: A Ten Year Comparison*, by Kenneth Rasinski et al. (Washington, DC: Government Printing Office, June 1993), p. 12 (hereafter cited as Rasinski, *Ten Years*).
[624]Ibid.
[625]Braddock, *Tracking Implications*, p. 2.
[626]Rasinski, *Ten Years*, p. 13.
[627]Ibid.
[628]Ibid.
[629]The 1980 data on high school sophomores comes from the first wave of *High School and Beyond* (*see* discussion of this data set above). The 1990 data on high school sophomores comes from the first (1990) follow-up of the *National Education Longitudinal Survey of 1988* (*see* discussion of this data set above). The first follow-up focused on the transition of students into high school.
[630]Ibid., p. 16. *See* table 4.23
[631]*See* table 4.23.
[632]Rasinski, *Ten Years*, pp. 14–15.
[633]Ibid., p. 16.
[634]*See* table 4.23.
[635]Rasinski, *Ten Years*, p. 17.

TABLE 4.23
Percentages of 1980 and 1990 High School Sophomores in General, College Preparatory, and Vocational High School Programs, by Gender and Race/Ethnicity

	General		College prep./academic		Vocational	
Student characteristics	**1980**	**1990**	**1980**	**1990**	**1980**	**1990**
All sophomores	46.0	50.8	33.1	41.3	21.0	7.9
Whites	47.4	51.7	35.0	42.0	17.6	6.3
Blacks	39.0	42.9	26.9	40.9	34.1	6.2
Asians	37.1	42.3	48.8	49.2	14.1	8.5
Native Americans	51.6	58.5	19.8	22.9	28.7	8.6
Hispanics	46.1	55.0	24.6	35.1	29.2	9.9
Males	46.4	50.9	32.5	40.6	21.1	8.4
Females	45.2	50.7	35.8	42.0	19.0	7.4

Source: U.S. Department of Education, National Center for Education Statistics, *America's High School Sophomores: A Ten Year Comparison*, by Kenneth Rasinski et al. (Washington, DC: Government Printing Office, June 1993), pp. 16–17.

from 10 to 7 percentage points.[636] In both 1980 and 1990, a higher percentage of Asians than whites participated in a college preparatory program.[637] Although the participation of Native Americans in the academic track increased from 20 percent (in 1980) to 23 percent (in 1990), their participation increased in the general program as well, from 52 percent (in 1980) to 59 percent (in 1990).[638]

High School Seniors.[639] During the period from 1972 to 1992, several discernible shifts occurred in high school program placement.[640] First, enrollment in academic programs declined between 1972 and 1980, falling from 46 percent to 39 percent. However, by 1992, enrollment returned to slightly above its 1972 level, as 48 percent of high school seniors were enrolled in academic programs.[641] The percentage of seniors participating in vocational programs declined significantly, from 22 percent in 1972 (and 24 percent in 1980) to 12 percent in 1992.[642]

The rebound in the academic enrollment program by high school seniors was fueled primarily by higher enrollment rates among females and minorities.[643] While the percentage of males enrolled in academic programs in 1992 was not statistically distinguishable from the percentage enrolled in 1972, the percentage of their female counterparts enrolled in academic programs increased significantly, from 43 percent to 49 percent.[644]

There has been no essential change in the percentage of white students enrolled in academic programs (about 50 percent of students). However, the percentage of blacks increased from 33 percent in the base year to 43 percent in 1992. As a result, the white-black gap in the participation rate by high school seniors in the academic program track decreased from 16 to 7 percentage points.[645] Similar to their black peers, the proportion of Hispanics enrolled in college preparatory programs increased from 27 percent in 1972 to 35 percent 1992. As a result, the Hispanic-white gap in this curricular track declined from 22 to 15 percentage points.[646]

The decline in the proportion of high school seniors enrolled in vocational programs occurred among subgroups of the population. First, the gender inequity in vocational program placement that was evident in 1972 (7 percentage points) is no longer apparent.[647] Specifically, although the proportion of males enrolled in this track declined from 19 to 12 percent during the two decades, the change for females was even larger. In 1972 slightly more than 26 percent were in the vocational track, which was reduced to 12 percent by 1992.[648]

With respect to race/ethnicity, the participation rate in vocational education by whites decreased from 21 to 11 percent. However, the decrease among black high school seniors was even more significant, from 33 to 17 percent of students. Hence, the black-white gap with respect to participation in vocational education was cut in half, decreasing from 12 to 6 percentage points.[649] Similarly, the participation rate among Hispanics in vocational education decreased from 30 to 14 percent, which reduced the Hispanic-white gap from 9 to 3 percentage points. Asians continued to have the smallest representation in this program, and their participation decreased from 13 percent (in 1972) to 9 percent (in 1992).[650]

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[636]Ibid., p. 17.

[637]*See* table 4.23.

[638]*See* table 4.23.

[639]The 1972 data on high school seniors comes from the *National Longitudinal Study of the High School Class of 1972*. The *National Longitudinal Study of the High School Class of 1972 (NLS-72)* began in the spring 1972 with a survey of a national probability sample of 19,001 high school seniors attending 1,061 public and private (secular and church-affiliated) schools. DOEd, *Trends 1972-1992*, p. 122. The sample was designed to be representative the approximately 3,000,000 high school seniors enrolled in more than 17,000 schools in spring 1972. The 69-minute student questionnaire covered items such as demographic characteristics (e.g., race/ethnicity, family SES), types of schools attended, courses and program tracks selected, grades received in specific courses, and satisfaction with one's current education institution. In addition, high school seniors were questioned about work experiences, values and political views, and plans for future (e.g., intended location and type of college, academic major, and occupation/profession). School administrators supplied data on each student, and schools' programs, resources, and grading systems. Ibid., p. 112. The five completed followups (1973, 1974, 1976, 1979, and 1986) were designed to obtain information on the transitions of young adults from high school through postsecondary education and the workplace. DOEd, *Digest of Education Statistics 1995*, p. 465. The 1992 data on high school seniors comes from the second (1992) followup to the *National Education Longitudinal Survey of 1988* (*see* discussion of this data set above).

[640]U.S. Department of Education, National Center for Education Statistics, *Trends Among High School Seniors, 1972–1992*, by Patricia Green et al. (Washington, DC: Government Printing Office, June 1995), p. iii (hereafter cited as DOEd, *1972–1992*).

[641]*See* table 4.24.

[642]*See* table 4.24.

[643]DOEd, *1972–1992*, p. iii.

[644] DOEd, *1972-1992*, p. 19.

[645]*See* table 4.24.

[646]*See* table 4.24.

[647]DOEd, *1972–1992*, p. 18.

[648]*See* table 4.24.

[649]*See* table 4.24.

[650]*See* table 4.24.

TABLE 4.24
Percentage of Seniors Enrolled in General, Academic, and Vocational High School Programs, by Gender and Race/Ethnicity

	General		College prep./academic		Vocational	
Student characteristics	**1972**	**1992**	**1972**	**1992**	**1972**	**1992**
All seniors	31.8	40.0	45.7	47.7	22.4	12.3
Whites	30.6	38.7	48.6	49.9	20.8	11.4
Blacks	34.2	40.2	32.7	42.8	33.1	17.0
Asians	33.7	34.6	53.5	56.2	12.8	9.2
Hispanics	42.4	50.6	27.4	35.4	30.1	14.1
Males	33.1	40.9	48.3	46.6	18.6	12.5
Females	30.6	39.1	43.2	48.8	26.2	12.1

Source: U.S. Department of Education, National Center for Education Statistics, *Trends Among High School Seniors, 1972–1992*, by Patricia Green, et al. (Washington, D.C.: Government Printing Office, June 1995, p. 19.

[1] Data on Native American students were not available.

Assessment of Patterns and Trends in Curricular Tracking: Racial/Ethnic Distribution of Students

Some members of the education community have been concerned that curricular tracking of secondary school students has reinforced the racial/ethnic and socioeconomic stratification of American society.[651] The analyses of high school sophomores and of seniors presented above show that significant disparities between whites and minorities continue. For instance, in contrast to white seniors, Hispanics are more likely to be in a general education program (51 percent compared to 39 percent).[652] And black seniors are more likely than white seniors to be enrolled in vocational education (17 percent compared to 11 percent).[653]

However, the gaps in participation in various programs by whites and ethnic minorities seem to be diminishing. The narrowing of the gap between white and minority participation rates in academic programs reflects a decline in the extent to which minorities are underrepresented in this curricular track. The narrowing of the gap between the rate of minority and white high school senior enrollment in vocational education reflects a decline in blacks' and Hispanics' overrepresentation in this program track.

Ability Grouping

Forms of Ability Grouping

Among the forms of ability grouping that have been proposed, several have been studied frequently by researchers.[654] One of the most common forms of ability grouping is *XYZ classes*.[655] In this practice, students at a single grade level are divided into groups (e.g., high, middle, and low) on the basis of ability level, and the groups are taught in separate classrooms (also referred to as *between-class grouping* or *ability-grouped class assignments*).[656] In *cross-grade grouping*, children from several grades who are at the same level of achievement in a single subject are formed into groups, which are then taught in separate classrooms, without regard to the children's regular grade placement or age.[657] The practice of *within-class grouping* allows a teacher to form ability groups within a single classroom, and provide each group with separate instruction appropriate to its level of aptitude (also referred to as *intraclass grouping*).[658]

Separate classes can be used, for instance, for students who need remedial assistance in core subjects or for students labeled as "gifted and talented."[659] *An accelerated class* allows students who are high in aptitude in a particular subject to receive instruction that enables them to proceed more rapidly through their schooling or to complete their schooling at an earlier age than other students.[660] A *special enriched class* for the gifted and talented would be appropriate for students who are identified as "high" in academic aptitude to receive a richer, more varied educational experience than would be available in the regular curriculum for their age level.[661]

Status of "Full Scale" and Between-Class Ability Grouping in Public High Schools

As a function of instruction, ability grouping is predominately employed at the secondary education level.[662] Approximately 86 percent of public secondary schools in the 1993–1994[663] school year were comprehensive (as opposed to specialized), and they reported that they offered courses in their core curriculum that are differentiated in terms of content, quantity or intensity of work, or expectations regarding independent work.[664] Only 15 percent of public secondary schools claimed that they differentiated students into various groupings, based on their diverse overall academic abilities[665] in the core curriculum.[666] Of these schools with *full-scale* ability grouping,[667] almost 60 percent claimed that State and or local

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[651]Rasinski, *Ten Years*, p. 13.

[652]*See* table 4.24.

[653]*See* table 4.24.

[654]Kulik, *Research on Gifted*, p. 2.

[655]Ibid.

[656]Ibid. and Laura Schindelman and Jennifer Szoo, *What is the Impact of Heterogeneous Grouping versus Homogeneous Grouping on Secondary Student Performance*? (West Hartford, CT: St. Joseph College, December 1991), p. 2.

[657]Kulik, *Research on the Gifted*, p. 2.

[658]Ibid.

[659]Ibid.

[660]Ibid.

[661]Ibid., p. 2.

[662]Schindelman and Szoo, *What is the Impact of Heterogeneous Grouping?* p. 2.

[663]The year 1993–1994 is the most recent year of information on school policies and practices used to structure curricula and assign pupils with diverse needs, abilities, and learning rates to courses and program tracks . The data were obtained by DOEd from a nationally representative sample of more than 900 public secondary schools. *See* Carey, *Differentiation*, p. 5.

[664]Carey, *Differentiation*, p. 5.

[665]Measures of ability can be based on a combination of a composite achievement measure, IQ scores, and/or teacher judgment. *See* Braddock, *Tracking Implications*, p. 5.

[666]Carey, *Differentiation*, p. 5.

[667]More specifically, with full-scale ability grouping, students are divided based on their ability level, and each group is instructed separately for the full-day rather than a single subject only. *See* Kulik, *Research on the Gifted*, p. 2.

educational agencies influenced their approaches to providing instruction to students with different abilities.[668] The practice of full-scale homogeneous ability grouping is found more often in schools with "sizable" (more than 20 percent) minority (e.g., black and Hispanic) student enrollment.[669]

Of the remaining 85 percent of public secondary schools that *do not* practice overall, full-scale homogeneous groupings of students based on their ability level, 71 percent practice ability grouping *within specific core subject areas* such as mathematics and English, whereby students are sorted based on the school's measure of student ability. In contrast, the remaining 14 percent of public secondary schools (i.e., those that do not implement full-scale nor within-subject ability grouping) reported that they offered a variety of classes that are open or accessible to all students (regardless of a measured "ability" level) who have taken the prerequisite subjects.[670]

In the fall 1993–1994 school year, as a result of more than 70 percent of secondary schools allocating students to classes based on some measure of academic ability, the majority of public school secondary students, with sophomores used as an example (86 percent in mathematics and 72 percent in English), were thereby enrolled in core courses designed for discrete levels of ability.[671] With respect to mathematics, 27 percent, 41 percent, and 16 percent of students were in the high, average, and low ability level classes, respectively.[672] The remaining 14 percent of high school sophomores participated in mathematics classes designed for students with widely differing abilities.[673]

For English classes, 23 percent, 39 percent, and 9 percent of sophomores attending public schools were in high, average, and low ability level classes, respectively.[674]

The remaining 28 percent of students enrolled in English were in courses with a heterogeneous ability group of students.[675] For science and social studies secondary school classes, 42 percent and 39 percent of public schools, respectively, grouped students according to ability.[676]

Racial/Ethnic Distribution of High School Students in Core Academic Subjects

Patterns of course ability grouping by race/ethnic student subgroups revealed dissimilar distributions between whites and blacks. For instance, only 34 percent of black high school students, especially seniors, were enrolled in their "top"[677] level mathematics or science classes, compared to 39 percent of their white counterparts.[678] Similar patterns among blacks and whites were found in the "top" English (30 and 36 percent, respectively) and social studies classes (37 and 43 percent, respectively) in their schools.[679]

Both black and Hispanic students (particularly high school seniors) were overrepresented in remedial English and mathematics.[680] In contrast, both blacks and Hispanics were significantly underrepresented in honors English and honors mathematics classes.[681]

Core Subject Ability Grouping in Public Middle Schools

Ability grouping in the Nation's high schools could be a vestige of the ability grouping in core subjects that occurs in middle schools. Approximately 20 percent of public middle schools have ability grouping for each core subject.[682] For instance, most 8th graders in 1988[683] were enrolled in English (96 percent) and mathematics (97 percent) classes.[684] Four percent of the remaining students were not enrolled in English classes and 3 percent were not enrolled in mathematics.[685]

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[668]Carey, *Differentiation*, p. 5.

[669]Braddock, *Tracking Implications*, p. 6.

[670]Carey, *Differentiation*, p. 5.

[671]Ibid., pp. 14 and 16. Some members of the education community report that, across all types of schools, mathematics and English are the subjects most often grouped by ability. *See* Braddock, *Tracking Implications*, p. 6.

[672]Carey, *Differentiation*, p. 14. The concept of "high," "middle," and "low" ability for any subject area (e.g., mathematics, English) was not explained by the author.

[673]Carey, *Differentiation*, p. 5. The percentages may not sum to 100 because of rounding.

[674]Ibid., p. 16.

[675]Ibid. The percentages may not sum to 100 because of rounding.

[676]Braddock, *Tracking Implications*, p. 15.

[677]The criteria to distinguish among student ability levels in any of the academic courses discussed were not explained by the author.

[678]Braddock, *Tracking Implications*, p. 6.

[679]Ibid.

[680]Ibid., p. 7. The author did not report the extent of the overrepresentation, other than state that it was "statistically significant."

[681]Ibid. Note: The author did not report the extent of the underrepresentation, other than state that it was "statistically significant."

[682]Ibid., p. 6.

[683]The most recent year of ability grouping data on middle school students is the eighth grade class of 1988.

[684]U.S. Department of Education, National Center for Education Statistics, *A Profile of the American Eighth Grader*, by Anne Hafner et al. (Washington, DC: Government Printing Office, June 1990), pp. 36 and 39 (hereafter cited as DOEd, *Eighth Graders*).

[685]Ibid., p. 34.

While almost 60 percent of students were enrolled in regular mathematics, almost one-third were enrolled in more academically demanding courses (e.g., prealgebra, algebra, advanced, or honors classes). About 5 percent of students were enrolled in remedial mathematics. Gender differences in mathematics course enrollments were small, with about equal percentages of males and females taking each level of math class (e.g., approximately 60 percent in regular mathematics and 32 percent in advanced mathematics).[686]

There were some significant differences in courses taken by racial and ethnic groups.[687] Although there were virtually no differences among blacks, whites, and Hispanics in enrollment in regular mathematics (Hispanics, 62 percent; blacks, 60 percent; and whites, 58 percent), there were some noticeable disparities in remedial and advanced mathematics enrollment patterns. While 34 percent of whites participated in advanced classes, only 26 percent of blacks and 24 percent of Hispanics did so.[688] Similarly, only 4 percent of whites were in remedial mathematics, compared to more than 7 percent for the two ethnic minorities.[689]

Approximately 84 and 12 percent of 8th graders were in regular and remedial English, respectively.[690] More males than females reported taking remedial English (14 percent compared to 10 percent). Approximately 11 percent of blacks and whites were in a remedial class, compared to 17 percent of Hispanics.[691]

Example of Ability Grouping: Gifted and Talented Programs

Schools. In 1993–1994, 60 percent of the Nation's schools claimed to have a gifted and talented program, down from 64 percent in 1990–1991.[692] In the latter year, 71 percent of public schools (down from 75 percent in 1990–1991) and 25 percent of private schools (down from 30 percent in 1990–1991) offered this program to students.[693]

Students. In 1993–1994,[694] 6 percent of the Nation's public school students (or 2.68 million) participated in programs for the gifted and talented. The distribution was approximately 6 percent of elementary school students (1.68 million), 7 percent of secondary school students (almost 950,000), and 5 percent of students in K–12 schools (46,154 students).[695]

Based on 1989–1990 data,[696] 25 States were mandated to provide gifted and talented programs for their students.[697] For instance, in Illinois, 8 percent of public elementary and secondary students (or 141,537 pupils) were served in a gifted and talented program, compared to less than 4 percent in Mississippi.[698] In addition, most of the remaining States received discretionary State-supported funds for gifted and talented programs. In Michigan and New Jersey, for instance, almost 12 percent of each States' public school students benefited from discretionary funds for gifted and talented programs.[699]

Teachers. In 1993–1994, there were approximately 14,278 and 4,625 teachers at the elementary and secondary levels, respectively.[700] Previously, in 1990–1991, there were 12,865 and 5,137 teachers at the elementary and secondary levels, respectively.[701]

Measures of Achievement: Student Achievement on National Standardized Tests in Core Subjects

For the past two decades, the National Assessment of Educational Progress (NAEP) has assessed students' knowledge and skills in reading, writing, science, mathematics, and other subjects.[702] Although overall

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[686]Ibid.
[687]Ibid., p. 35.
[688]Ibid., p. 36.
[689]Ibid.
[690]Ibid., p. 37.
[691]Ibid., p. 39.
[692]DOEd, *1993–1994 Statistical Profile*, p. 26.
[693]Ibid., pp. 26–27, and *DOEd, Schools and Staffing in the United States: A Statistical Profile, 1990–1991* (Washington, DC: Government Printing Office, July 1993), p. 13.
[694]The year 1993–1994 is the most recent for national data on students in gifted and talented programs.
[695]DOEd, *Digest 1995*, p. 70.
[696]The year 1989–1990 is the most recent year of State data on gifted talented programs.
[697]DOEd, *Digest 1995*, p. 67.
[698]Ibid.
[699]Ibid.
[700]DOEd, *1993–1994 Statistical Profile*, p. 71.
[701]*DOEd, Schools and Staffing in the United States: A Statistical Profile, 1990–1991* (Washington, DC: Government Printing Office, July 1993), p. 53.
[702]DOEd, *Education 1994*, p. 48; and DOEd, *Education 1995*, p. 52. The NAEP is the only national, representative, and continuous assessment of what students know and how they perform in various subject areas. Since 1969 assessments have been conducted periodically in core subjects such as reading, writing, mathematics, and science. NAEP is a congressionally mandated project of DOEd's National Center for Education Statistics. The Commissioner of Education Statistics is responsible for providing continuing reviews of NAEP, conducting validity studies of the examinations, and soliciting public comment on NAEP's usefulness and conduct. In addition, in 1988, Congress created a governing body, the National Assessment Governing Board, to formulate policy guidelines for NAEP, to identify appropriate achievement goals for each grade level, to develop test specifications and objectives, as well as to

scores have not changed substantially over the last two decades, NAEP provides evidence that the large gap in achievement between whites and minorities[703] has narrowed.[704] Test scores of blacks have improved relative to those of whites in reading, mathematics, and science.[705] For instance, in 1971 the average reading proficiency among black 17-year-olds was more than 50 points below that of their white peers; the gap had decreased to 36 points by 1992.[706] Similarly, the gap between white and black 9-year-olds' science proficiency scores was reduced from 55 points in 1977 to 39 in 1992.[707]

Differences can be detected between the academic performance of Hispanic and white students beginning at age 9.[708] Academic proficiency in reading, mathematics, and science, as measured at age 9 by NAEP, is lower for Hispanic children than for their white peers.[709] Between the early 1970s and early 1990s, Hispanic students' NAEP math scores rose at all ages, and gaps between the scores of white and Hispanic students narrowed, particularly for 13-year-olds.[710]

At ages 9 and 13, the achievement levels of females (on the 1992 NAEP examinations) are higher in reading, similar in mathematics, and lower in science than those of males.[711] By age 17, based on 1992 NAEP results, females continue to outperform males in reading proficiency levels but begin to score lower than males in mathematics and science.[712] Indeed, girls' overall performance and pursuit of further studies in mathematics and science remain major issues in efforts undertaken by education researchers, policymakers, and practitioners to ensure gender equity in education.[713]

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ensure that all items selected for use in the assessment are free from racial, cultural, gender, or regional bias. U.S. Department of Education, National Center for Education Statistics; and Educational Testing Service, *NAEP 1992: Mathematics Report Card for the Nation and the States*, by Ina Mullis and others (Washington, DC: April 1993), inside cover.

[703]Data for this section on four proficiency examinations were available only for whites, blacks, and Hispanics.

[704]DOEd presents NAEP scores for various racial/ethnic groups and grade levels, and discusses the core subject areas where scores have increased or decreased between the 1970s and 1990s. However, the agency does not directly cite evidence that the assessment is unbiased, neutral, or nondiscriminatory. This concern also applies to the Scholastic Aptitude Test. This information is essential to convey in as many publications as possible because scholars and student advocates are concerned that invalid and unreliable State and national assessments may be used in a manner that discriminates unfairly among students. *See* John F. Jennings, ed. *National Issues in Education: Elementary and Secondary Education Act* (Washington, DC: Institute for Educational Leadership, 1995), p. 25.

With respect to NAEP especially, DOEd does not address, in conjunction with the tables that display the students' average scores, that some students (such as those in special education programs, or those who are considered limited English proficient) are granted exemptions from participating in NAEP. Publications, such as DOEd contractor reports, that are more specialized than the widely distributed compendiums completed by DOEd staff (e.g., the annual *Condition of Education)* have addressed issues related to exemption, such as the calculation of weighted percentages of excluded students. *See* U.S. Department of Education, National Center for Education Statistics; and Educational Testing Service, *NAEP: 1992: Mathematics Report Card for the Nation and the States*, by Ina Mullis et al. (Washington, DC: April 1993), pp. 314–15. Education policymakers and researchers who rely on DOEd publications should be informed about the types and estimated percentages of students who are excluded from specific nationwide proficiency assessments.

[705]DOEd, *Education 1994*, p. 48.

[706]DOEd, *Education 1995*, p. 54.

[707]Ibid., p. 60.

[708]Ibid., p. 7.

[709]Ibid.

[710]Ibid., p. 58.

[711]Ibid., p. 13.

[712]Ibid., p. 14.

[713]Congress' findings in the Women's Educational Equity Act, 20 U.S.C. §§ 7232–7238 (Supp. 1995), provide practical meaning to the term "gender equity in education." These findings are as follows:

(1) since the enactment of title IX of the Education Amendments of 1972, women and girls have made strides in educational achievement and in their ability to avail themselves of educational opportunities;

(2) because of funding provided under the Women's educational Equity Act, more curricula, training, and other educational materials concerning educational equity for women and girls are available for national dissemination;

(3) teaching and learning practices in the United States are frequently inequitable as such practices relate to women and girls, for example- (A) sexual harassment, particularly that experienced by girls, undermines the ability of schools to provide a safe and equitable learning or workplace environment; (B) classroom textbooks and other educational materials do not sufficiently reflect the experiences, achievements, or concerns of women and, in most cases, are not written by women or persons of color; (C) girls do not take as many mathematics and science courses as boys, girls lose confidence in their mathematics and science ability as girls move through adolescence, and there are few women role models on the sciences; and (D) pregnant and parenting teenagers are at high risk for dropping out of school and existing prevention programs do not adequately address the needs of such teenagers;

(4) efforts to improve the quality of public education also must include efforts to ensure equal access to quality education program for all women and girls;

Reading Proficiency

For 9-year-olds, the average reading proficiency score[714] increased between 1971[715] and 1980, but declined between 1980 and 1992.[716] In 1992, the average score for 9-year-olds was 210, basically the same proficiency level achieved in 1971.[717] For 13-year-olds, reading scores increased slightly over the two decades.[718] The increase in 13-year-olds' reading proficiency scores was part of an overall trend of increasing scores for other subjects for 13-year-olds.[719] For 17-year-olds, the average proficiency score rose slightly between 1975 and 1992 (from 256 to 260 and 286 to 290, respectively).[720] Between 1975 and 1992, at all three ages, the gaps in reading proficiency between whites and minorities have narrowed, but the performance level of blacks and Hispanics on the reading NAEP continues to trail behind that of whites.[721]

Race/Ethnicity Analysis. At the elementary level, in 1992 the average reading proficiency score of white students was 218, up 1 scale point from the 1975 level. Black 9-year-olds made slightly higher progress between the 2 years. For instance, black students' average score rose to 184 points, up from 181 in 1975. The gap between the scores of 9-year-old blacks and their white peers decreased during this period. However, most of this progress was made before 1988.

In 1992 13-year-old white students had an average reading proficiency score on the NAEP of 266, up from 262 in 1975.[722] Greater increases in proficiency scores were made most significantly by blacks and more modestly by Hispanics. In 1992 the average reading level of black students was 238, up 12 points from 226 in 1975. As a result, the gap between performance of white and black 13-year-olds was narrowed from 36 to 28 points.[723] Hispanic 13-year-old students had an average reading proficiency level of 239 in 1992, up from 232 in 1975, decreasing the gap with whites from 30 to 27 points.

Despite this progress, significant differences in reading performance are still evident for 13-year-olds in the 1990s. In fact, the 1992 reading proficiency levels for black and Hispanic students (238 and 239, respectively) were midway between the average proficiency scores of 9-year-old white students (218) and13-year-old white students (266).[724] Apparently, between 1975 and 1994, the knowledge gained in the education community about reading proficiency of elementary and secondary school students has not had a sufficient impact to close the proficiency gaps between minority 17-year-old students and white 13-year-old students.

Between 1975 and 1992, reading proficiency scores among 17-year-olds have increased slowly but steadily. For 17-year-olds the average proficiency score of white students was 297, up from 293 in 1975. Black students showed the greatest gains, with average scores improving steadily from 241 in 1975 to 243 in 1980, and to its peak of 274 in 1988.[725] However, by 1992, the

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(5) Federal support should address not only research and development of innovative model curricula, and teaching and learning strategies to promote gender equity, but should also assist schools and local communities implement gender equitable practices;

(6) Federal assistance for gender equity must tied to systemic reform, involve collaborative efforts to implement effective gender practices at the local level, and encourage parental participation; and

(7) excellence in education, high educational achievements and standards, and the full participation of women and girls in American society, cannot be achieved without educational equity for women and girls.[20 U.S.C.A. § 7232(1)–(7) (Supp. 1995)]

[714]Reading proficiency has a range from 0 to 500:
Level 150: Simple discrete reading tasks
Level 200: Partial skills and understanding
Level 250: Interrelates ideas and makes a generalizations
Level 300: Understands relatively complicated information
Level 350: Learns from specialized reading materials. *See* DOEd, *Education 1995*, p. 54.
The arrangement of the levels of proficiency on a hierarchical scale does not necessarily imply that the knowledge and skills described in successive levels are acquired by students in a hierarchical manner. However, the descriptions associated with the proficiency levels do describe the knowledge and skills that are *typical* of the groups of students who performed at successively high levels of proficiency. *See* U.S. Department of Education, Office of Educational Research and Improvement and Educational Testing Service, *The 1990 Science Report Card/NAEP's Assessment of Fourth, Eighth, and Twelfth Graders* (Washington, DC: Educational Testing Service, March 1992), p. 27.

[715] DOEd, *Digest of Education Statistics 1995*, p. 44.

[716] DOEd, *Education 1995*, p. 54.

[717] DOEd, *Education 1995*, p. 52 and DOEd, *Digest of Education Statistics 1995*, p. 44. Although 1971 is the base year, 1975 is the first year of the most complete NAEP reading proficiency data for whites, blacks, and Hispanics. DOEd, *Education 1995*, p. 54.

[718] DOEd, *Education 1995*, p. 54.

[719] DOEd, *Digest of Education Statistics 1995*, p. 44.

[720] DOEd, *Condition of Education 1995*, p. 54.

[721]*See* table 4.25.

[722]Ibid.

[723]Ibid.

[724]U.S. Department of Education, National Center for Education Statistics, *The Educational Progress of Black Students* (Washington, DC: May 1995), p. 3 (hereafter cited as DOEd, *Progress*).

[725]DOEd, *Education 1995*, p. 54.

TABLE 4.25
Average Reading Proficiency Score, by Gender and Race/Ethnicity[1]

	All students	Males	Females	Whites	Blacks	Hispanics
Age 9						
1971	208	201	214	213	170	N/A
1975	210	204	216	217	181	183
1980	215	210	220	221	188	190
1984	211	208	214	218	186	187
1988	210	208	216	218	189	194
1990	209	204	214	217	182	189
1992	210	206	215	218	184	192
Age 13						
1971	255	250	261	261	222	N/A
1975	256	250	262	262	226	232
1980	258	254	263	264	233	237
1984	257	253	262	263	236	240
1988	258	252	263	261	243	240
1990	257	250	263	262	242	238
1992	260	254	265	266	238	239
Age 17						
1971	285	279	291	291	239	N/A
1975	286	280	291	293	241	252
1980	286	282	289	293	243	261
1984	289	284	294	295	264	268
1988	290	286	294	295	274	271
1990	290	284	296	297	267	275
1992	290	284	296	297	261	271

Source: U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1995*, by Thomas Smith et al. (Washington, D.C.: Government Printing Office, June 1995), p. 54.

[1] Data presented in this table were not available for students who are members of other racial and ethnic groups, such as Asian Americans and Native Americans.

average score dropped somewhat to 261, or 20 points above the 1975 level. As a result, the proficiency gap between the scores of white and black students was narrowed from 52 points in 1975 to 36 points in 1992.[726]

In 1975 the average reading proficiency score of black 17-year-olds was well below that of their white peers (52 scale points) and also below that of white 13-year-olds (21 scale points).[727] However, by 1992, because of the progress in assessed reading skills, the proficiency of blacks was closer (36 points) to that of its white peers, and relatively similar to that of 13-year-old white students.[728] According to the Department of Education, black children, on average, are reading at a level as much as 2 years below their white peers by the time they enter high school.[729]

For 17-year-olds, the performance gap between whites and Hispanics declined from 41 to 26 points, because Hispanic students' average reading NAEP score rose 19 points between 1975 and 1992, from 252 to 271.[730] The trend of Hispanic students' NAEP scores shows that their reading proficiency level is rising and approaching the level of their white peers.

For 17-year-olds, in 1971, blacks' average reading proficiency score was more than 52 points below that of their white peers, and also 22 points below that of white 13-year-olds.[731] By 1992 the proficiency gap between Hispanic students and their white peers was reduced by 15 points, and Hispanic 17-year-olds were performing slightly higher on the reading NAEP than white 13-year-olds.[732] According to the Department of Education, most of the gains in reading were made before 1984.[733]

Differences in performance between Hispanics and whites begin as early as age 9.[734] In 1975, the reading proficiency gap between Hispanics and whites was 34 scale points.[735] The achievement gap in reading between Hispanics and whites persist at age 13, and the gap has not narrowed since 1975. Specifically, the gap in scores for Hispanic and white 13-year-olds was about 30 scale points in both 1975 and 1992.[736] Moreover, in 1992, the average reading proficiency score of Hispanic 13-year-olds fell midway between that of white 9-year-olds (218) and that of their white 13-year-old peers (266).[737]

Among 17-year-olds, NAEP scores indicated a large gap between Hispanics and whites. However, unlike the Hispanic-white gap for 9- and 13-year-olds, the gap for 17-year-olds narrowed somewhat between 1975 (about 40 points) and 1992 (26 scale points). In 1975, Hispanic 17-year-olds had an average NAEP score (252) about 10 scale points below the level (262) achieved by white 13-year-olds. By 1992, this proficiency gap had closed, as Hispanic 17-year-olds and white 13-year-olds were performing at about the same level.[738]

DOEd reports that the reading skills of white, black, and Hispanic 17-year-olds all have increased since the mid-1970s, with scores of blacks and Hispanics increasing more than those of their white peers.[739] However, the white-ethnic minority gap may be no longer narrowing.[740] DOEd contends that NAEP data from the 1990s suggest that minority groups have lost some of their earlier gains they had made relative to whites.[741]

White 13-year-olds (22 scale points below). However, by 1992, blacks' average score was closer (36 points below) to that of white peers, and close to that of 13-year-old whites. Although the average NAEP reading proficiency scores indicate a large black-white achievement gap in the 1990s, the test scores of blacks improved relative to those of their white peers since the 1970s.

Gender Analysis. In 1971, in all three age groups, females clearly outperformed males with respect to reading proficiency. The female-male gaps were 13, 11, and 12 points, respectively, at ages 9, 13, and 17.[742] By 1992, there was no significant evidence that males were increasing their reading proficiency scores to approach parity with females. The gender gaps were 9, 11, and 12 points, respectively, at ages 9, 13, and 17.[743] The average reading proficiency of females being 12 points higher than that of their male peers near the end of high school corresponds to 40 percent of the difference between the average scores of 13- and 17-year olds in 1992.[744] The gap in reading proficiency between males and females is approximately equivalent to about 1.5 years of schooling.

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[726]Ibid.
[727]Ibid. *See* table 4.25.
[728]Ibid.
[729]DOEd, *Progress*, p. 3.
[730]DOEd, *Education 1995*, p. 54.
[731]*See* table 4.25.
[732]DOEd, *Education 1995*, p. 54.
[733]DOEd, *Education 1995*, p. 8.
[734]Ibid., p. 8.
[735]Ibid.
[736]Ibid., p. 7.
[737]Ibid.
[738]Ibid., pp. 7-8.
[739]DOEd, *Condition of Education 1996*, p. 19.
[740]Ibid.
[741]DOEd, *Condition of Education 1995*, p. v.
[742]DOEd, *Condition of Education 1996*, p. 19.
[743]Ibid.
[744]DOEd, *Progress of Women*, p. 4.

International Assessment. According to DOEd, fewer than 40 percent of black 4th graders and 30 percent of black 9th graders in 1991 scored at least average on international benchmarks, when compared to students in 32 other countries.[745] About one-half of Hispanic Americans in the 4th grade and 35 percent in the 9th grade met or surpassed the average.[746] Approximately 70 percent of white 4th graders and 60 percent of 9th graders reached or exceeded the average performance among members of the Organization for Economic Cooperation and Development that participated in the study.[747]

At both grade levels, the gaps between the percentages of white and black students who perform at least average on an international benchmark assessment are significant at 30 percentage points. Hispanic students do not trail behind whites to the same extent as their black peers. Specifically, the gaps between the percentages of white and Hispanic students reaching a benchmark standard are 20 and 25 percentage points for 4th and 9th graders, respectively.

Writing Proficiency

Between 1984 and 1992, the national average writing proficiency scores[748] did not change consistently across all three grade levels. At the 4th grade level, the average score increased by 3 points from 204 to 207; and the average 8th grade score rose 7 points from 267 to 274[749] At the 12th grade level, in contrast, the national average proficiency score declined by 3 scale points, from 290 to 287. However, not all three racial/ethnic groups experienced a slip in their assessed writing skills.[750]

Race/Ethnicity Analysis. At the 4th grade level, there were no significant changes in average proficiency scores for either whites, blacks, or Hispanics between 1984 and 1992. At the eighth grade level, scores of white students decreased between 1984 and 1990 and then increased between 1990 and 1992. Hispanics' average NAEP scores increased significantly relative to those of their white peers between 1984 and 1992. Blacks also showed significant increases in their writing proficiency scores between 1990 and 1992. However, the gaps between proficiency scores of white and minority 8th graders continued to be evident. At the 11th grade level, overall, neither white, black, nor Hispanic students experienced a significant change in their writing proficiency scores between 1984 and 1992. As a result, the gaps between 11th grade blacks and whites, and Hispanics and whites did not change significantly.

For high school juniors, in 1992 writing was the weakest core subject of white students (just as science was for black and Hispanic high school students), with the average writing score being 294, down 3 points from 297 in 1984.[751] In 1992 black students' average writing proficiency score was 263, down from 270 in 1984. Because the proficiency score of black students fell more than that of their white peers, the gap between the proficiency scores of white and black students widened, increasing by 4 points, to 31 points in 1992 from 27 points in 1984.[752]

However, the progress of Hispanic students that occurred at the middle school level continued in high school as well. In fact, despite an overall national decline in high school juniors' assessed writing skills, Hispanic students increased their performance by 15 scale points, to 274 in 1994, up from 259 in 1984. As a result, the gap between the writing proficiency levels whites and Hispanics was reduced by 18 points, from 38 to 20 points, or almost one-half of its 1984 level.[753]

In 1984 both Hispanic and black high school juniors were performing not only below the level of their white peers, but both groups had average writing proficiency scores below the 272 score for white 8th graders.[754] Blacks' and Hispanics' average writing scores were 2 and 13 points, respectively, behind the average score for the middle school white students.[755] By 1992 the average proficiency score of white eighth graders had increased by 7 points above the 1984 level, to 279. Because the average writing proficiency score of black 11th graders fell 7 points between 1984 and 1992, the gap between white 8th graders and black high school writing proficiency widened by 14 scale points from 2 in 1984 to 16 points in 1994. Hispanic high school students' average writing proficiency score rose even more (from 259 to 274, or 15 points) than did the

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[745]"ED: Blacks, Hispanics Lack World-Class Reading Skills," *Education Daily*, June 18, 1996 (vol. 29, no. 117), p. 1.

[746]Ibid.

[747]Ibid.

[748]The writing proficiency scale has a range from 0 to 500 with a mean of 250.
Level 150: Disjointed, unclear writing
Level 200: Incomplete, vague writing
Level 250: Focused, clear writing
Level 300: Complete, sufficient writing
Level 350: Effective, coherent writing
See DOEd, *Education 1995*, p. 56.

[749]Ibid.

[750]*See* table 4.26.

[751]Ibid.

[752]Ibid. *See* table 4.26.

[753]Ibid.

[754]*See* table 4.26.

[755]DOEd, *Education 1995*, p. 56.

TABLE 4.26
Average Writing Proficiency Score, by Gender and Race/Ethnicity[1]

	All students	Males	Females	Whites	Blacks	Hispanics
Fourth grade						
1984	204	200	208	211	182	188
1988	206	199	213	215	173	190
1990	202	195	209	211	171	184
1992	207	198	216	217	175	189
Eigth grade						
1984	267	258	276	272	247	247
1988	264	254	274	269	246	250
1990	257	246	268	262	239	246
1992	274	264	285	279	258	265
Eleventh grade						
1984	290	281	299	297	270	259
1988	291	282	299	296	275	274
1990	287	276	298	293	268	277
1992	287	279	296	294	263	274

Source: U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1995*, by Thomas Smith et al. (Washington, D.C.: Government Printing Office, June 1995), p. 56.

[1] Data presented in this table were not available for students who are members of other racial and ethnic groups, such as Asian Americans and Native Americans.

proficiency level of white 8th graders. As a result, the gap between the proficiency levels of high school Hispanics and middle school whites decreased by 8 scale points to 5 in 1992 from 13 in 1984.[756]

Gender Analysis. Consistently, at all grade levels, similar to the gender discrepancies in reading proficiency, females clearly outperform males on the writing NAEP. Between 1984 and 1992, in the 4th grade, females' scores were consistently rising while those of their male peers were consistently falling.[757] As a result, males were performing consistently further behind females, and the female-male gap in writing proficiency rose from 8 points in 1984, to 14 points in 1988, and to 18 points in 1992.[758] Gender differences between 1984 and 1992 on the performance assessment were larger at the middle school level, but the female-male gap did not increase as noticeably (from 18 to 21 points). In the 11th grade, between 1984 and 1992, the gap between performance of males and females narrowed slightly from 18 to 17 points.[759]

Summary Statements about Writing Proficiency. In 1992, of the four core areas of NAEP for high school students, writing was white pupils' weakest subject.[760] Of the four core areas between the early 1970s and 1990s, writing is the only one in which the gap between proficiency levels of white and black high school students rose.[761] In 1992 writing was the only core subject in which the gap between the proficiency levels of white 8th graders and black high school juniors increased from the base year.[762] Writing was the only core area in the 1990s in which Hispanic high school students' average proficiency score was below that of white 8th graders. However, the gap between the proficiency levels of white 8th graders and Hispanic 11th graders was smaller in 1992 than in 1977.[763] In 1992, along with mathematics, writing is the core subject (based on the 1992 NAEP assessments in both subject areas) in which Hispanic high school students perform closest to parity with their white peers.[764]

Mathematics Proficiency

Students improved their knowledge and understanding of mathematical concepts and applications between 1973 and 1992, and average national math proficiency[765] scores rose (for all age groups) by 11, 7, and 3 points for elementary, middle, and high school students, respectively.[766] At the elementary level, average proficiency scores rose from 219 to 230, while average middle school students' scores rose from 266 to 273.[767] At the high school level, from 1973 to 1992, the average proficiency score increased from 304 to 307.

At all three grade levels, much of the elevated average national performance from 1973 to 1992 can be attributed to the scores of minorities, which rose in most cases to a much greater extent than those of their white peers.[768]

Race/Ethnicity Analysis. Trends in math NAEP scores over the past 20 years show that not all three racial/ethnic subgroups increased their proficiency at the same pace. White students made their greatest gain in elementary school, and blacks and Hispanics gained most in middle school.[769] As a result, each grade level presents a different story of how trends in proficiency score changes (from 1973 to 1992) compare across the groups.

At the elementary level, across all race/ethnicity groups of 4th graders, achievement levels were relatively flat between 1973 and 1982, but showed large improvements within the next 10 years. Scores of white students increased by 10 scale points, from 225 in 1973 to 235 in 1992. However, because 4th grade blacks' scores increased even more, from 190 to 208, the gap between math NAEP scores of blacks and whites narrowed, from 35 to 27 points.[770] Because elementary school Hispanic and white students' scores were both up 10 scale points from their respective 1973 levels of 202 and 225, the gap between the math proficiency of whites and Hispanics remained unchanged at 23 scale points.[771]

At the middle school level, between 1973 and 1992, white students' average math proficiency score rose to 279, a modest 5 points above the 274 scale point level. The math NAEP scores of blacks and Hispanics have increased considerably over the past 20 years. In 1992

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[756]Ibid.
[757]*See* table 4.26.
[758]DOEd, *Education 1995*, p. 56.
[759]Ibid.
[760]Ibid., pp. 54, 56, 58, and 60.
[761]Ibid.
[762]Ibid.
[763]Ibid.
[764]Ibid.

[765]The mathematics proficiency scale has a range of 0 to 500.
Level 150: Simple arithmetic facts
Level 200: Beginning skills and understanding
Level 250: Numerical operations and beginning problem solving
Level 300: Moderately complex procedures and reasoning
Level 350: Multi-step problem-solving and algebra
See DOEd, *Education 1995*, p. 58.
[766]DOEd, *Education 1995*, p. 58.
[767]Ibid.
[768]*See* table 4.27.
[769]*See* table 4.27.
[770]DOEd, *Education 1995*, p. 58.
[771]Ibid.

TABLE 4.27
Average Mathematics Proficiency Score, by Gender and Race/Ethnicity[1]

	All students	Males	Females	Whites	Blacks	Hispanics
Age 9						
1973	219	218	220	225	190	202
1978	219	217	221	224	192	203
1982	219	217	222	224	195	204
1986	222	222	222	227	202	205
1990	230	229	230	235	208	214
1992	230	231	228	235	208	212
Age 13						
1973	266	265	267	274	228	239
1978	264	264	265	272	230	238
1986	269	270	268	274	249	254
1990	270	271	270	276	249	255
1982	269	269	268	274	240	252
1992	273	274	272	279	250	259
Age 17						
1973	304	309	301	310	270	277
1978	300	304	297	306	268	276
1982	298	302	296	304	272	277
1986	302	305	299	308	279	283
1990	305	306	303	310	288	284
1992	307	309	304	312	286	292

Source: U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1995*, by Thomas Smith et al. (Washington, D.C.: Government Printing Office, June 1995), p. 58.

[1] Data presented in this table were not available for students who are members of other racial and ethnic groups, such as Asian Americans and Native Americans.

the average NAEP score of black middle school students was 250, up 22 points from the 228 level in 1973. As a result, the gap between proficiency levels of black and white students decreased by 17 points, to 29 from 46 scale points.[772]

Of the three racial/ethnic groups of 8th graders, Hispanic students' math NAEP score had the second highest increase above the 1972 level. The 20-point gain above the 239 score resulted in an average math NAEP score of 259, narrowing the gap with white middle school students by 15 points, from 35 to 20 points.[773]

At the high school level, between 1973 and 1992, white students' average math proficiency score rose to 312, which was only 2 points higher.[774] The gains in math NAEP scores of blacks and Hispanics were higher. In 1992 the average NAEP score of black high school seniors was 286, up 16 points from the 1973 level of 270. As a result, the gap between proficiency scores of black and white 12th graders declined from 40 to 26 scale points, or a difference of 14 points.[775] Hispanic students' average score in 1993 was 292, up 15 points from the base year score of 277. Due to this gain, the gap in proficiency levels between Hispanics and whites was reduced by 13 points, from 33 to 20.

Mathematics is a core subject area in which black and Hispanic high school seniors have made considerable progress in their proficiency scores, relative to the scores of their white peers. The DOEd considers increased mathematics proficiency for all students regardless of their race/ethnicity to be critical, especially since the fifth goal of the National Education Goals Panel is for United States, by the year 2000, to be first in the world in mathematics and science achievement.[776] In 1973 black high school students' average math NAEP score was 4 points behind the proficiency of white 8th graders.[777] By 1992 the average math NAEP score of black 12th graders was 7 points ahead of white middle school students' average score. Mathematics is the only core area in the 1990s in which black high school students perform at a level above white 8th graders. Also, in 1992 math was the core subject in which black high school students performed closest to parity with their white high school peers.

Similarly, the gap between the math proficiency of Hispanic and white high school students has narrowed over time (even though the difference remains large). In 1973 Hispanic students' average NAEP score was 33 scale points below the level of their white counterparts, and about the same as that of white 8th graders; by 1992 it was about 20 scale points behind that of their white peers and 13 scale points above that of 8th grade whites.[778] In the 1990s mathematics proficiency and writing are the core subject areas in which Hispanic 12th graders are performing closest to parity with their white peers.[779]

Gender Analysis. In 1973, at the elementary and middle school levels, females had average math NAEP proficiency scores that were slightly ahead (2 scale points) of those reached by their respective male peers.[780] At the 4th grade level, between 1973 and 1992, the average NAEP score rose somewhat for females (from 220 to 228), but increased even more for their male peers (from 218 to 231). As a result, the gender gap in favor of females reversed, since males' average mathematics proficiency level exceeded that of female peers by 3 scale points.[781]

Similarly, between 1973 and 1992, at the middle school level, the average mathematics NAEP score increased more for males (from 265 to 274) than for their female peers (from 267 to 272). Consequently, the gender gap in favor of females reversed itself, since 8th grade males' average mathematics NAEP score was 2 scale points higher than that of their female counterparts.[782]

At the high school senior level, males' average mathematics NAEP score of 309 was unchanged over the two decades, while females' average mathematics NAEP score rose from 301 to 304 points.[783] As a result the male-female gap in math proficiency scores declined from 8 to 5 scale points.[784]

Science Proficiency

As stated above, one of the goals of the National Education Goals Panel is for all students to be the best in the world in mathematics and science.[785] The data on

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[772]Ibid.
[773]Ibid.
[774]Ibid., p. 58.
[775]Ibid.
[776]National Education Goals Panel, *Data Volume for the National Education Goals Report* (Washington, DC: Government Printing Office, 1994), p. 81 (hereafter cited as NEGP, *Data Volume*).
[777]DOEd, *Education 1995*, p. 58.
[778]Ibid., p. 8.
[779]Ibid., p. 58. *See* table 4.27.
[780]DOEd, *Education 1995*, p. 58. *See* table 4.27.
[781]Ibid.
[782]Ibid.
[783]DOEd, *Education 1995*, p. 58.
[784]Ibid. *See* table 4.27.
[785]NEGP, *Data Volume*, p. 81.

science NAEP scores from 1977[786] to 1992 reveal that national average science proficiency scores[787] among 4th and 8th graders increased substantially during this period, while scores for 12th grade students increased to a smaller extent.[788] Specifically, scores rose from 220 to 231 for 4th graders and from 247 to 258 for 8th graders.[789] High school seniors' average NAEP scores increased from 290 to 294.[790]

Race/Ethnicity Analysis. At the elementary level, between 1977 and 1992, white students' average NAEP science score rose a relatively modest 9 points to 239. Science proficiency for blacks rose by more, 25 points, to reach a proficiency score of 200. As a result, the science proficiency gap between white and black students was reduced by 16 points, from 55 to 39 points. For Hispanics, the average science proficiency score in 1992 was 205, up 13 points. As a result, the science proficiency gap with white students narrowed by 4 points, from 38 to 34 points. Despite the reduction in the white-minority gaps, both black and Hispanic 4th graders' average science proficiency remained well below that of their white peers.

At the middle school level, in 1992 average proficiency of white students rose 11 points from the 256 level to 267.[791] More substantial increases were made by black and Hispanic students. In 1992 black students achieved a score of 224, up from 208 in 1977, or a 16 point increase. As a result, the gap between white and black students declined 5 points, from 48 to 43 scale points. Hispanics increased their science proficiency scores to a greater extent than their white and black peers. Specifically, in 1992 Hispanics reached a proficiency level of 238, up from 213 in 1977, or a 25 point gain.[792] As a result, the gap between whites and Hispanics narrowed by 14 points from 43 to 29 points.[793]

In 1977 black 8th graders were performing at a level not only 48 points below their white peers, but also 22 points below the 230 score of white 4th graders. Although between 1977 and 1992 the white-black achievement gap narrowed from 48 to 43 points, black 8th graders continued to have an average NAEP proficiency score well behind (15 points) the 239 score of white 4th graders as well.[794]

Similarly, in 1977 Hispanic 8th graders were performing at a level not only 43 points below their white peers, but also 17 points below the 230 score of white 4th graders. However, between 1977 and 1992, the white-Hispanic science proficiency gap narrowed 14 points, from 43 (in 1977) to 29 points (in 1992), and Hispanic 8th graders were performing about on par with white fourth graders.

In 1992 the average science proficiency score for white high school seniors was 304, up 6 points from 298 in 1977.[795] The gains from 1977 to the most recent year in science proficiency for both blacks and Hispanics were more substantial. For instance, in 1992 the average science proficiency level for black students was 256, up 16 points from the 1977 level of 240. As a result, the proficiency gap with white seniors decreased 10 points from 58 to 48 scale points.[796] Similarly, for Hispanic students, the 1992 average science proficiency level was 270, up 8 points from the 262 level achieved in 1977. The resulting gap with their white peers declined slightly 2 points from the base level, from 36 to 34 points.

Despite the gains in science proficiency experienced by high school minorities, both blacks and Hispanics continue to trail behind their white peers in demonstrating (on the NAEP proficiency) science knowledge and understanding of concepts, and ability to analyze scientific procedures and data.[797] In addition, black high school seniors continue to perform below the proficiency level of white 8th graders. However, this gap has been reduced by 5 scale points, from 16 (in 1977) to 11 scale points in 1992.

Gender Analysis. Between the 1970s and 1990s, girls did not score as high as their male peers on the NAEP science proficiency test at any age. Compared to reading, writing, and mathematics, science is the only core subject in which females score lower than their male peers at all three ages. At age 17, in 1992, girls scored about 10 scale points lower on the science assessment relative to their male peers. DOEd reports

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[786]Although 1970 is the "base" year, the year 1977 is the first year of complete data for whites, blacks, and Hispanics. *See* DOEd, *Education 1995*, p. 60.

[787]The science proficiency scale has a range from 0 to 500.
Level 150: Knows everyday science facts
Level 200: Understands simple science information
Level 250: Applies general scientific information
Level 300: Analyzes scientific procedures and data
Level 350: Integrates specialized scientific information.
See DOEd, *Education 1995*, p. 60, and supplemental Diagram 1 for detailed explanations of levels. *See* DOEd, *Education 1994*, p. 211.

[788]DOEd, *Education 1995*, p. 60.

[789]Ibid.

[790]Ibid. *See* table 4.28.

[791]Ibid.

[792]Ibid.

[793]Ibid.

[794]DOEd, *Education 1995*, p. 60.

[795]Ibid., p. 60.

[796]Ibid.

[797]Ibid.

TABLE 4.28
Average Science Proficiency Score, by Gender and Race/Ethnicity[1]

	All students	Males	Females	Whites	Blacks	Hispanics
Age 9						
1970	225	228	223	236	179	N/A
1973	220	223	218	231	177	N/A
1977	220	222	218	230	175	192
1982	221	221	221	229	187	189
1986	224	227	221	232	196	199
1990	229	230	227	238	196	206
1992	231	235	227	239	200	205
Age 13						
1970	255	257	253	263	215	N/A
1973	250	252	247	259	205	N/A
1977	247	251	244	256	208	213
1982	250	256	245	257	217	226
1986	251	256	247	259	222	226
1990	255	258	252	264	226	232
1992	258	260	256	267	224	238
Age 17						
1970	305	314	297	312	258	N/A
1973	296	304	288	304	250	N/A
1977	290	297	282	298	240	262
1982	283	292	275	293	235	249
1986	288	295	282	298	253	259
1990	290	296	285	301	253	262
1992	294	299	289	304	256	270

Source: U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1995*, by Thomas Smith et al. (Washington, D.C.: Government Printing Office, June 1995), p. 60.

[1] Data presented in this table were not available for students who are members of other racial and ethnic groups, such as Asian Americans and Native Americans.

that the 10-point difference is equivalent to 1 year's worth of science. Despite the gains made by both boys and girls in science proficiency, especially since 1982, the gender gaps at all three ages are significant and have not narrowed measurably.[798]

The science proficiency score of 4th grade females has increased somewhat between the mid-1970s and 1992. In 1992 the average NAEP score of females at the elementary level was 227, up from 218 (or 9 points) in 1977.[799] However, because their male peers' average science NAEP score increased even more, from 222 to 235 (or by 13 points), the gap between the science proficiency levels of males and females widened from 4 to 8 points.[800]

At the secondary school level, science proficiency scores on the NAEP have increased since the mid-1970s. At the 8th grade level, for instance, although the average NAEP science score for females (244) was noticeably lower than that of males (251) in 1977, the average proficiency score increased more for females than their male peers. By 1992 the average science NAEP score for females was 256, compared to 260 for their male counterparts. As a result, the gap between the proficiency scores of middle school females and males declined from 7 in 1977 to 4 in 1992.[801]

Similarly, at the 12th grade level, females' average science proficiency score (282) was considerably lower than that of their male counterparts (297) in 1977. However, the average science score rose more for females than for their male peers. By 1992 the average proficiency score for females was 289, compared to 299 for males. As a result, the gap between the NAEP science scores of high school senior females and males narrowed from 15 in 1977 to 10 in 1992.[802]

Summary Statements about the Core Subject of Science. In 1992 science was the weakest core subject for both black and Hispanic high school students (just as writing was for white high school students), as measured by the NAEP.[803] In 1992 the widest gaps between the NAEP proficiency scores of white and ethnic minority high school students were in science.[804]

[798]Ibid., p. 14.
[799]Ibid.
[800]Ibid.
[801]Ibid.
[802]Ibid.
[803]Ibid., pp. 54, 56, 58, and 60.
[804]Ibid.

Scholastic Aptitude Test (SAT)

In the past two decades, from 1972 to 1994, mean SAT scores of college-bound[805] seniors declined on the math portion by 5 points (from 484 to 479) and fell more significantly on the verbal section, from 453 to 423.[806]

After 1972 the average mathematics SAT score began falling rapidly and was 12 points lower within 4 years, further eroding into the 460s in the early 1980s, before gradually rising.[807] Despite the overall decline in math SAT scores, the proportion of students scoring above 600 on this section increased from 17 in 1972 to 18 percent in 1994.[808]

Verbal scores fell in the early 1970s, dropping to 431 by 1976 and reaching a low of 422 in 1991 before slightly rising.[809] The proportion of students scoring above 600 during this time period decreased from 11 to 7 percent.[810]

Between 1976[811] and 1994, the average math and verbal SAT scores of white students rose 2 points (from 493 to 495) and fell 8 points (451 to 443), respectively.[812] However, this pattern masks differing trends for the demographic subpopulations. For instance, in 1994, the average SAT math score of black students was 388, up 34 points from the 1976 score of 354.[813] As a result of the changes in whites' and blacks' average scores during this period, the white-black gap narrowed from 139 to 107 points, or 32 points.[814]

In 1976 both Native Americans and Hispanics[815] had a lower average mathematics SAT score (420 and 401,

[805]The term "college bound seniors" refers to those students from each high school graduating class who participate in the College Board Admission Testing Program. This does not include all high school seniors, nor all first-year college students, as approximately one-third of high school graduates participate in the American College Testing Program. *See* DOEd, *Education 1995*, p. 68.
[806]DOEd, *Education 1995*, p. 68. *See* table 4.29. For a discussion of the debate surrounding the use of the Scholastic Achievement Test, *see* U.S. Commission on Civil Rights, *The Validity of Testing in Education and Employment* (May 1993).
[807]DOEd, *Education 1995*, p. 68.
[808]Ibid., p. 234.
[809]Ibid., p. 68. *See* table 4.29.
[810]DOEd, *Education 1995*, p. 234.
[811]The first year that SAT scores were available by race/ethnicity was 1976. *See* DOEd, *Education 1995*, p. 235.
[812]Ibid.
[813]Ibid.
[814]Ibid.
[815]Data on SAT scores were not complete for the entire Hispanic population, but are complete from 1976 to 1994 (with the exception of 1986) for Puerto Rican students. Therefore, data on Puerto Rican students are used as a proxy for all Hispanic students.

TABLE 4.29
Mean SAT Scores of College-bound Seniors, by Race/Ethnicity

	Total		Whites		Blacks		Hispanics		Asian Americans		Native Americans	
	Verbal	Math	Verbal	Math	Verbal	Math	Verbal	Math	Verbal	Math	Verbal	Math
1972	453	484	–	–	–	–	–	–	–	–	–	–
1973	445	481	–	–	–	–	–	–	–	–	–	–
1974	444	480	–	–	–	–	–	–	–	–	–	–
1975	434	472	–	-	–	–	–	–	–	–	–	–
1976	431	472	451	493	332	354	364	401	414	518	388	420
1977	429	470	448	489	330	357	355	397	405	514	390	421
1978	429	468	446	485	332	354	349	388	401	510	387	419
1979	427	467	444	483	330	358	345	388	396	511	386	421
1980	424	466	442	482	330	360	350	394	396	509	390	426
1981	424	466	442	483	332	362	353	398	397	513	391	425
1982	426	467	444	483	341	366	360	403	398	513	388	424
1983	425	468	443	484	339	369	358	403	395	514	388	425
1984	426	471	445	487	342	373	358	405	398	519	390	427
1985	431	475	449	490	346	376	368	409	404	518	392	428
1986	431	475	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
1987	430	476	447	489	351	377	360	400	405	521	393	432
1988	428	476	445	490	353	384	355	402	408	522	393	435
1989	427	476	446	491	351	386	360	406	409	525	384	428
1990	424	476	442	491	352	385	359	405	410	528	388	437
1991	422	474	441	489	351	385	361	406	411	530	393	437
1992	423	476	442	491	352	385	366	406	413	532	395	442
1993	424	478	444	494	353	388	367	409	415	535	400	447
1994	423	479	443	495	352	388	367	411	416	535	396	441
1995	428	482	448	498	356	388	372	411	418	538	403	447

Source: U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1995*, by Thomas Smith et al. (Washington, D.C.: Government Printing Office, June 1995), pp. 68 and 235, and U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1996*, by Thomas Smith et al. (Washington, D.C.: U.S. Government Printing Office, 1996), p. 235. Note: The first year for which SAT scores by racial/ethnic group are available is 1976. Also, data were not collected by racial/ethnic group in 1986. *See The Condition of Education 1995*, p. 235.

respectively) than that their white peers (493). Within the previous two decades, the increases in average math SAT scores were greater for both Native American and Hispanic students than they were for their white peers. By 1994 the average mathematics SAT scores for Native American and Hispanic students were 441 and 411, respectively. As a result, the gap between the average SAT score of whites and Native American declined from 73 to 54 points.[816] Similarly, the gap between the average math SAT score of whites and Hispanics diminished from 92 to 84 points.[817]

Every year between 1976 and 1994, the average SAT math scores of Asian Americans exceeded those of their white peers, while the gap continued to widen. For instance, in the base year, Asian Americans had an average score of 518, which was 25 points higher than that of whites. By 1984 Asian Americans had an average score of 519 points, and the gap with their white peers enlarged to 32 points. Similarly, in 1989 and again in 1990, Asian Americans' average math SAT scores of 525 and 528 resulted in gaps of 34 and 37 points, respectively.[818] By 1994 Asian Americans' average math SAT score rose 17 points from the base year to 535, which enlarged the gap between mathematics proficiency of Asian Americans and whites to 40 points.[819]

Trends in SAT verbal scores reveal that between 1976 and 1994, in comparison with several major racial/ethnic subgroups of youth, white students were the only ones whose verbal SAT scores decreased, while their black peers' verbal scores showed the highest increase. Specifically, in 1994, the average verbal SAT of white students was 443, down from 451 in 1976. Their black peers scored 352 on the 1994 SAT verbal section, up from 332 in 1976.[820] Although the gap between the average SAT verbal score of black and white students is still sizable, it narrowed from 119 to 91 during this period.[821]

Also between the mid-1970s and 1990s, Native Americans' average SAT verbal scores rose 8 points, from 388 to 396. Because the average white student's verbal SAT fell 8 points, the gap between average verbal SAT scores of Native Americans and whites narrowed by 16 points, from 63 in 1976 to 47 points in 1994.[822]

Verbal SAT scores of Asian American and Hispanic students increased only marginally during this time period; and most of the gap reduction between the SAT verbal scores of these two minorities and their white peers can be explained by the fall in white students' average verbal SAT score.

Since the mid-1970s, student participation in the SAT exam has increased significantly.[823] For instance, in 1994 more than 42 percent of high school graduates[824] took the SAT, up from one-third in 1982.[825] Almost one-third of minority high school graduates took the exam in 1993, up from 23 percent in 1988 and 15 percent in 1976.[826] This increase may be partially attributed to the growing percentage (8 percent in 1993, up from 2 percent in 1976) of Asian Americans taking the SAT.[827]

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[816] *See* table 4.29.
[817] *See* table 4.29.
[818] DOEd, *Education 1995*, p. 235.
[819] Ibid.
[820] Ibid.
[821] Ibid.
[822] *See* table 4.29.

[821] DOEd, *Education 1995*, p. 234.
[824] This figure represents the number of individuals taking the SAT in the year relative to the number of high school graduates in the same year expressed as a percentage. *See* DOEd, *Education 1994*, p. 225.
[825] DOEd, *Education 1995*, p. 234.
[826] Ibid.
[827] DOEd, *Education 1994*, p. 48.

Chapter 5

The Department of Education's Civil Rights Enforcement

Administrative Responsibility for Civil Rights Enforcement within the U.S. Department of Education

The primary office at the U.S. Department of Education (DOEd) responsible for enforcing the civil rights statutes is the Office for Civil Rights (OCR). OCR enforces Title VI of the Civil Rights Act of 1964,[1] Title IX of the Education Amendments of 1972,[2] and section 504 of the Rehabilitation Act of 1973.[3] OCR's civil rights implementation and enforcement activities include civil rights policy development and dissemination, investigation of complaints alleging discrimination by recipients of the Department of Education's financial assistance, and initiation of enforcement actions against recipients who refuse to comply with civil rights requirements willingly.[4] In addition, OCR undertakes proactive activities to promote civil rights compliance and uncover and remedy instances of noncompliance. Such proactive activities include: conducting outreach and education to inform applicants, recipients, participants, and beneficiaries of Department of Education-funded programs of civil rights requirements; providing technical assistance to recipients to help them comply with civil rights requirements; and conducting compliance reviews of recipients to uncover and remedy violations of civil rights laws.[5]

In addition to OCR, two other Department of Education offices play a role in civil rights enforcement; the Office of Special Education and Rehabilitative Services (OSERS) and the Office of the General Counsel (OGC). The Office of Special Education and Rehabilitative Services interacts with OCR where section 504 issues overlap with issues related to the Individuals with Disabilities Education Act,[6] which is in its purview.[7] To assist in the coordination of their efforts, OCR and OSERS operate under a memorandum of understanding that was instituted on July 29, 1987.[8]

The General Counsel serves as the principal advisor to the Secretary on all legal matters affecting departmental programs and activities.[9] With respect to civil rights, OGC reviews all civil rights regulations and policies developed by OCR before they are submitted to the Secretary of Education for approval and advises the Secretary as to their legal sufficiency. OGC brings together both program assistance and enforcement issues in the areas of race, national origin, age, gender,

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[1]42 U.S.C. §§ 2000d to 2000d-7 (1988 & Supp. V 1993).

[2]20 U.S.C. §§ 1681-1688 (1988 & Supp. V 1993).

[3]29 U.S.C. § 794 (1988 & Supp. V 1993). In addition to these statutes, OCR also enforces the Age Discrimination Act of 1975 and the Americans with Disabilities Act of 1990, and OCR helps implement civil rights provisions in Title V, part A, of the Elementary and Secondary Education Act. *See* Office for Civil Rights, U.S. Department of Education, "Fiscal Year 1996 Budget Request," p. Z-9 (hereafter cited as OCR FY 1996 Budget Request).

[4]*See* U.S. Commission on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs* (Washington, DC: U.S. Government Printing Office, June 1996), chap. 5 (hereafter cited as U.S. Commission on Civil Rights, *Title VI Enforcement*).

[5]*See* Ibid.

[6]20 U.S.C. §§ 1400-1485 (1988 & Supp. V 1993).

[7]*See* chap. 3 for a basic description of the Office of Special Education and Rehabilitative Services.

[8]*See* Madeleine S. Will, Assistant Secretary, Office of Special Education and Rehabilitative Services, and LeGree S. Daniels, Assistant Secretary, Office for Civil Rights, Memorandum of Understanding Between the Office for Civil Rights and the Office of Special Education and Rehabilitative Services, July 29, 1987, Policy Codification System Document No. 152 (hereafter cited as OSERS–OCR Memorandum of Understanding).

[9]U.S. Department of Education, Administrative Communications Systems, *Mission and Organizational Manual*, Office of the General Counsel, vol. I, part B (1992), p. 1 (hereafter cited as *1992 Mission Manual OGC*). OGC's mission includes the following:

- Provides legal advice and services to the Secretary, Deputy Secretary, Principal Officers of the Department of Education, or any other person authorized to request such advice or services;
- Prepares and reviews public documents, rules, regulations issued by DOEd, and legal instruments entered into by the Department;
- Represents the Secretary, DOEd, or any of its officers or units in court or administrative litigation, except for administrative proceedings initiated by the Office for Civil Rights;
- Serves as liaison to other Federal agencies in connection with legal matters involving DOEd;
- Drafts legislation proposals originating in the Department and reviews the legal aspects of proposed or pending legislation; and
- Prepares or reviews briefs, memoranda, and other legal documents for proceedings involving the Department or requested by other government agencies for use in proceedings except for administrative proceedings initiated by the Office for Civil Rights. *1992 Mission Manual OGC*, p. 1.

and disability.[10] Based on OGC's concerns with the regulatory process, the General Counsel aims to ensure that OCR has a consistent relationship with Office of Special Education and Rehabilitative Services, Office of Elementary and Secondary Education, and Office of Bilingual Education and Minority Language Affairs.[11]

In addition, OGC has general responsibility for the Department of Education's civil rights enforcement activities, except for administrative proceedings, which are conducted by OCR.[12] The General Counsel is responsible for all litigation involving the Department, including civil rights litigation. However, as a practical matter, the General Counsel often relies on OCR to perform much of the work relating to civil rights litigation, subject to the General Counsel's review.[13] A 1980 memorandum details the responsibilities of OGC and OCR with respect to three types of litigation activity: referral of cases to the Department of Justice, *amicus curiae* briefs, and defensive litigation. Civil rights cases are referred to the U.S. Department of Justice for litigation, and the Department recommends that the Department of Justice file an *amicus curiae* brief upon the advice of the Assistant Secretary for Civil Rights, after review by the General Counsel. In civil rights cases filed against the Department of Education, the General Counsel is responsible for coordinating the Department of Education's defense with the Department of Justice, but may use OCR's expertise and staff resources. Although OGC has primary responsibility for all litigation matters, for most litigation, OCR attorneys interact directly with the Department of Justice.[14]

In a recent interview, Judith Winston, the Department of Education's General Counsel and a civil rights attorney, described her role as follows: "As general counsel, I have the sole responsibility for referring cases" from the Department of Education to the Department of Justice, "so all of the legal work [on civil rights] that flows out of the department first flows through my office."[15]

OCR's Mission and Responsibilities

Generally

OCR was created by mandate of the Department of Education Organization Act of 1979,[16] which also established the Department of Education. OCR serves as the Department of Education's civil rights enforcement office and is responsible for ensuring that recipients of Federal financial assistance do not discriminate against American students, faculty, or other individuals on the basis of race, color, national origin, sex, disability, or age.[17] OCR's mission is to "ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights."[18] Although this mission statement does not include language on equal educational opportunity, OCR has, in many ways, incorporated elements fundamental to equal educational opportunity as it has implemented and enforced civil rights laws.

OCR enforces five Federal statutes prohibiting discrimination on the basis of race, color, national origin, sex, disability or age in programs funded by the Department of Education.[19] In addition, OCR helps implement civil rights provisions in Title V, part A, of the Elementary and Secondary Education Act, the magnet schools assistance program.[20] To understand OCR's responsibilities relating to the civil rights law, it is useful to understand the basic provisions of the civil rights statutes and their scope on OCR's authority.

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[10]General Counsel, Office of General Counsel, U.S. Department of Education, information memorandum to DOEd Secretary, June 10, 1980, "Civil Rights Enforcement Between the General Counsel and Assistant Secretary for Civil Rights," p. 1 (hereafter cited as OGC/OCR Information Memorandum). In addition to the immediate office of the General Counsel, OGC has three major components: Program Service, Postsecondary and Departmental Service, and the Regulations and Legislation Service. The Office of the General Counsel also has an Operations Management Staff located in the immediate office of the General Counsel, which reports directly to the General Counsel. The Operations Management Staff is responsible for financial management and administrative services within OGC. *See 1992 Mission Manual OGC*, p. 2.

[11]OGC/OCR Information Memorandum, p. 1.

[12]*See* ibid., p. 3.

[13]*See* ibid.

[14]*See* ibid., pp. 3-4.

[15]Judith Winston, General Counsel, U.S. Department of Education, as cited in "Winston's Civil Rights Focus Stems From Her Work in the 60s," *Education Daily Special Supplement*, July 2, 1996, pp. 4-6.

[16]Pub. L. No. 96-88, 93 Stat. 668 (1979).

[17]U.S. Department of Education, Office for Civil Rights, *FY 1994 Annual Report to Congress*, app. A (hereafter cited as OCR, *FY 1994 Annual Report*).

[18]*See* Office for Civil Rights, "Strategic Plan," Draft, July 22, 1994 (hereafter cited as OCR Strategic Plan); U.S. Department of Education, *Fiscal Year 1994 Civil Rights Implementation Plan*, p. 1 (hereafter cited as DOEd, *FY 1994 Implementation Plan*).

[19]OCR has enforcement responsibility for: Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1988); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1988 & Supp. V 1993); section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988 & Supp. V 1993); the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107 (1988 & Supp. V 1993); and Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12,131-12,134 (Supp. V 1993).

[20]20 U.S.C.S. §§ 7201–7213 (Law. Co-op. 1996).

Below is a summary discussion of Title VI of the Civil Rights Act of 1964,[21] Title IX of the Education Amendments of 1972,[22] and section 504 of the Rehabilitation Act of 1973.[23]

Title VI

Title VI of the Civil Rights Act of 1964 prohibits race, color, and national origin discrimination in any federally assisted program or activity, including public and private schools.[24] Title VI provides that "[n]o person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[25] The objective of Title VI is to prohibit recipients of Federal funds from discriminating against the intended beneficiaries of those funds. As applied to programs operated by the U.S. Department of Education, Title VI requires DOEd to administer and enforce Title VI through the issuance of rules, regulations, or orders establishing the standards for compliance.[26] DOEd's rules, regulations, and orders must be "consistent with the achievement of the objectives" of the program or activity for which the financial assistance is being extended.[27] DOEd's rules, regulations, and orders also must be approved by the President.[28] Executive Order 12,250 provides the Attorney General with the authority vested in the President by Title VI to approve all agency rules, regulations, and orders.[29]

Effective implementation and enforcement of Title VI should convince a DOEd recipient that (1) the financial assistance provided by DOEd is essential to the operations of the recipient's program; (2) voluntary compliance with DOEd's Title VI regulations will allow the recipient to receive and retain Federal financial assistance; and (3) DOEd will withhold the assistance if discrimination exists in its program, or if discrimination elsewhere in its operations affects the program.[30]

Title VI allows DOEd to enforce compliance with its rules, regulations, or orders either: (1) by terminating or refusing to grant or to continue financial assistance, or (2) by "any other means authorized by law."[31] DOEd may not terminate funds until and unless there has been an "express finding on the record, after opportunity for hearing," of noncompliance.[32] That action must be limited in its effect to the particular recipient, or part thereof, and the particular program in which a violation has been found.[33]

In addition to these limitations, no action of any kind may be taken unless and until DOEd has advised the recipient of its failure to comply and has determined that compliance cannot be achieved voluntarily.[34] If DOEd selects termination or discontinuance of financial assistance as the means of enforcement, it must file a written report justifying its action with the congressional committee having jurisdiction over the particular assistance program. No action may be finalized until 30 days thereafter.[35]

The statute also provides that any action taken to effect compliance under Title VI is subject to judicial review. The type of review granted is that "as may otherwise be provided by law for similar action taken by such department or agency on other grounds."[36] Where DOEd's action involves the denial of financial assistance, any aggrieved person may request judicial review.[37]

Title VI empowers Federal agencies to refuse funding to and to terminate funding for any recipient

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[21]42 U.S.C. § 2000d (1988).
[22]20 U.S.C. § 1681 (1988).
[23]29 U.S.C. § 794 (1988 & Supp. V 1993).
[24]42 U.S.C. § 2000d (1988).
[25]42 U.S.C. § 2000d (1988).
[26]42 U.S.C. § 2000d-1 (1988).
[27]42 U.S.C. § 2000d-1 (1988).
[28]42 U.S.C. § 2000d-1 (1988).
[29]Exec. Order No. 12,250, § 1-101, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988). The authority and responsibility for coordinating Title VI implementation and enforcement among all the agencies with Title VI responsibility is vested in the Attorney General under Executive Order 12,250. This order also applies to Title IX of the Higher Education Amendments Act of 1972, section 504 of the Rehabilitation Act of 1973, and "any other provision of Federal statutory law which provides. . .that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." Exec. Order No. 12,250, § 1-101, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988). For a further discussion of the Attorney General's Title VI responsibility, *see* U.S. Commission on Civil Rights, *Title VI Enforcement*, chap. 3. *See also* Brian K. Landsberg, "The Federal Government and the Promise of *Brown*, "*Teachers College Record*, vol. 96, no. 4 (Summer 1995), pp. 627-36.
[30]The Civil Rights Restoration Act of 1987 amended "the definition of program or activity" in Title VI as it applies to the scope and coverage of Title VI and the reach of fund termination actions. 42 U.S.C. § 2000d-4a (1988). *See* U.S. Commission on Civil Rights, *Title VI Enforcement*, chap. 2.
[31]42 U.S.C. § 2000d-1 (1988).
[32]34 C.F.R. § 100.8(c) (1995).
[33]34 C.F.R. § 100.8(c) (1995).
[34]42 U.S.C. § 2000d-1 (1988).
[35]42 U.S.C. § 2000d-1 (1988).
[36]42 U.S.C § 2000d-2 (1988).
[37]42 U.S.C § 2000d-2 (1988).

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found in violation of Title VI regulations, after an opportunity for an administrative hearing and voluntary compliance.[38] Although Title VI expressly provides for administrative enforcement only, lower courts have consistently recognized private suits, also known as private rights or causes of action, as a means of enforcing Title VI.[39] Courts have allowed such private individuals to initiate lawsuits under Title VI because, although fund termination may serve as an effective deterrent to recipients, it may leave the victim of discrimination without a remedy. Fund termination may eliminate entirely the benefit sought by the victim.[40]

In conducting its Title VI compliance and enforcement activities for students having limited English proficiency, OCR relies on the U.S. Supreme Court decision in *Lau v. Nichols*[41] which upheld Title VI administrative regulations from 1970 stating:

> Where inability to speak and understand the English language excludes national origin minority-group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.[42]

In *Lau*, the Supreme Court held that the San Francisco school system's failure to provide English-language instruction or other adequate instructional procedures to students who do not speak English constitutes discrimination based on national origin.[43] Thus, as part of its enforcement responsibilities under Title VI, OCR requires school systems receiving Federal financial assistance to provide programs for students with limited English proficiency.[44]

Title IX

OCR has enforcement responsibility for Title IX of the Education Amendments of 1972, as amended, which prohibits gender discrimination under any educational program or activity receiving Federal financial assistance.[45] Title IX of the Education Amendments of 1972 provides that:

> [N]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.[46]

Modeled after Title VI of the Civil Rights Act of 1964, Title IX's coverage includes discrimination on basis of sex against both students and employees of educational institutions. Title IX has been used most frequently in providing equal access to educational programs for women by eliminating policies and procedures that discriminate against women.[47] OCR's Title IX implementation, compliance, and enforcement activities closely resemble those of Title VI. For example, as with its Title VI enforcement, OCR may deny or discontinue Federal assistance to educational programs found in noncompliance with the statute's prohibition against discrimination.[48] In addition, OCR conducts enforcement of Title IX primarily through complaint investigations and compliance reviews of select recipients.

Title IX attempts to promote gender equity in education programs through provisions that require educational agencies and institutions to take proactive measures in keeping with the statute's prohibition against discrimination on the basis of sex. For example, Title IX requires States to designate an employee to

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[38]42 U.S.C. § 2000d-1 (1988). As discussed earlier, agencies must also provide a written report to the congressional committee having jurisdiction over the assistance program at issue delineating the bases for fund termination. 42 U.S.C. § 2000d-1 (1988).

[39]*See, e.g.*, Neighborhood Action Coalition v. City of Canton, 882 F.2d 1012, 1015 (6th Cir. 1989); Larry P. v. Riles, 793 F.2d 969, 977 n.3 (9th Cir. 1984); Montgomery Improvement Ass'n v. United States Dep't of Hous. and Urban Dev., 645 F.2d 291, 294-97 (11th Cir. 1981); NAACP v. Medical Ctr., Inc., 599 F.2d 1247 (3d Cir. 1979); Bossier Parish Sch. Bd. v. Lemon, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); Soria v. Oxnard Sch. Dist., 386 F. Supp. 539 (C.D. Cal. 1974); Blackshear Residents Org. v. Housing Auth. of Austin, 347 F. Supp. 1138 (W.D. Tex. 1971); Hawthorne v. Kenbridge Recreation Ass'n, Inc., 341 F. Supp 1382 (E.D. Va. 1972); Gautreaux v. Chicago Hous. Auth., 265 F. Supp. 582 (N.D. Ill. 1967).

[40]*See, e.g.*, Cannon v. Univ. of Chicago, 441 U.S. 677, 705-06 (1979).

[41]414 U.S. 563 (1974).

[42]J. Stanley Pottinger, Director, Office for Civil Rights, U.S. Department of Health, Education, and Welfare, "Identification of Discrimination and Denial of Services on the Basis of National Origin," May 25, 1970, 35 Fed.Reg. 11595.

[43]Lau v. Nichols, 414 U.S. 563, at 568-69 (1974).

[44]The U.S. Commission on Civil Rights will offer a comprehensive treatment of this aspect of OCR's Title VI enforcement in an upcoming report on civil rights enforcement and the development and implementation of education programs for students whose primary language is other than English and who have limited English proficiency.

[45]20 U.S.C. § 1681 (1988).

[46]20 U.S.C. § 1681(a) (1988).

[47]American Association of University Women, *Creating a Gender-Fair Federal Education Policy* (January 1993), p. 1.

[48]James S. Wrona, "Eradicating Sex Discrimination in Education: Extending Disparate-Impact Analysis to Title IX Litigation," 21 Pepp. L. Rev. 1, 4-5 (1993).

"coordinate Title IX efforts and activities."[49] In addition, Congress enacted the Women's Educational Equity Act to provide funding for research and education programs designed to further the goals of gender equity in education.[50] However, Title IX exempts certain education policies and programs from its coverage.

In *Cannon v. University of Chicago*,[51] the U.S. Supreme Court held that Title IX conferred a private right of action on plaintiffs despite the statute's lack of an explicit provision conferring such a right. At the elementary and secondary education level, Title IX litigation has largely focused on the area of gender equity in athletic programs[52] and single-sex educational institutions.[53] However, the statute's protections extend to sex discrimination in *all* areas of education programs, both academic and athletic. For example, in its 1994 Strategic Plan, OCR identified "the under-representation of women, girls and minorities in mathematics and science high track courses" as a priority compliance issue.[54]

Section 504

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against an otherwise qualified individual with a disability on the basis of that disability, under any federally assisted program or activity, including public and private schools.[55]

Section 504 is a civil rights law protecting qualified individuals with disabilities. Like Title VI of the Civil Rights Act of 1964[56] and Title IX of the Education Amendments of 1972,[57] section 504 prohibits discrimination in *federally assisted* programs or activities.[58] Unlike Title VI and Title IX, section 504 also prohibits discrimination under any *federally conducted* programs or activities.[59] Specifically, section 504 provides that:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[60]

As an executive agency providing Federal financial assistance to schools, colleges, and universities through the country, the U.S. Department of Education has responsibility to issue regulations as may be necessary to implement section 504.[61]

Section 504 does not expressly address conduct in the context of public elementary and secondary education, although the provision would apply to any program or activity relating to public elementary or secondary education as long as that program or activity receives Federal financial assistance. Section 504 defines "program or activity" to mean "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government" or "a local educational agency . . ., system of vocational education, or other school system."[62] It, therefore, includes the operations of a State department of education, special school districts, and public elementary and secondary school systems.

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[49]20 U.S.C. §§ 1681-1688 (1988 & Supp. 1993). *See also* Susan S. Klein, ed., *Handbook for Achieving Sex Equity Through Education* (Baltimore, MD: The Johns Hopkins University Press, 1985), p. 97.

[50]Pub. L. No. 93-380, Title IV, § 408, 88 Stat. 554 (1974) (codified as Title V, Part B of the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3695-3701, at 20 U.S.C.S. §§ 7231-7238 (Law. Co-op. 1996)). This education program funding statute states among its purposes "to promote gender equity in education in the United States"; and "to provide financial assistance to enable educational agencies and institutions to meet the requirements of title IX of the Educational Amendments of 1972." 20 U.S.C.S. § 7232(1)-(2) (Law. Co-op. 1996).

[51]441 U.S. 677 (1979).

[52]*See* Yellow Springs Exempted Village Sch. Dist. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651 (6th Cir. 1981); O'Connor v. Bd. of Educ. of Sch. Dist. 23, 645 F.2d 578 (7th Cir. 1981), *cert. denied*, 454 U.S. 1084, 70 L. Ed. 2d 619, 102 S. Ct. 641 (1981), *on remand*, 545 F. Supp. 376 (N.D. Ill. 1982); Ridgeway v. Montana High Sch. Ass'n, 633 F. Supp. 1564 (D. Mont. 1986), *aff'd*, 858 F.2d 579 (9th Cir. 1988).

[53]*See* Vorcheimer v. School Dist. of Philadelphia, 525 F.2d 880 (3rd Cir. 1976), *aff'd by an equally divided court*, 430 U.S. 703 (1977); Garret v. Bd. of Educ. of the Sch. Dist. of Detroit, 775 F. Supp. 1004 (E.D. Mich. 1991).

[54]OCR Strategic Plan. The Commission will offer a comprehensive treatment in an upcoming enforcement report on civil rights enforcement and gender equity in mathematics and science education programs.

[55]29 U.S.C. § 794 (1988 & Supp. V 1993).

[56]42 U.S.C. § 2000d (1988). Title VI prohibits exclusion from participation in, denial of the benefits of, or discimination under any program or activity receiving Federal financial assistance, on the basis of race, color, or national origin. *Id.*

[57]20 U.S.C. §§ 1681-1688 (1988 & Supp. V 1993). Title IX prohibits exclusion from participation in, denial of the benefits of, or discrimination under any program or activity receiving Federal financial assistance, on the basis of sex. *Id.*

[58]29 U.S.C. § 794(a) (Supp. V 1993).

[59]29 U.S.C. § 794(a) (Supp. V 1993).

[60]29 U.S.C. § 794(a) (Supp. V 1993).

[61]29 U.S.C. § 794(a) (Supp. V 1993).

[62]29 U.S.C. § 794(b) (1988).

Section 504 provides that the remedies, procedures, and rights set forth in Title VI are available for violations under section 504.[63] Consequently, Federal agencies may refuse funding to or terminate funding for any recipient found in violation of section 504 or the section 504 regulations, after an opportunity for an administrative hearing and voluntary compliance.[64] Although the language of section 504 does not expressly permit individuals to file private lawsuits, many lower courts have recognized that section 504 affords a private cause of action.[65]

In section 504 employment cases, the remedies, procedures, and rights set forth in Title VII of the Civil Rights Act of 1964 are available under section 504. However, a court may take into account the reasonableness of the cost of any necessary workplace accommodation and the availability of alternatives or other appropriate relief.[66] Further, section 504 expressly permits a prevailing party, "in any action or proceeding to enforce or charge a violation" of section 504, to recover a reasonable attorney's fee as part of the costs.[67]

Section 504 establishes an Interagency Disability Coordinating Council composed of the heads of several Federal agencies, including the Secretary of Education.[68] The Council is responsible for developing and implementing agreements, policies, and practices designed to (1) maximize effort; (2) promote efficiency; (3) eliminate conflict, competition, duplication, and inconsistencies among the operations, functions, and jurisdictions of various Federal departments, agencies, and branches; and (4) coordinate operations, functions, and jurisdictions of various Federal departments and agencies. It also conducts studies and activities to identify methods for overcoming barriers to integration into society, dependence, and productivity of individuals with disabilities.[69]

The Council has served as an active and useful way for ensuring consistency in the implementation and enforcement of disabilities laws. The Council has held meetings throughout the 1980s and 1990s. It has responded to recent developments in disabilities law, such as passage of the Americans with Disabilities Act (ADA) in 1990. For example, it permitted agencies to brief the Council on their ADA implementation activities pertaining to regulatory development, technical assistance, and enforcement, and subsequently, it disseminated to Federal agencies a revised policy statement designed to assist agencies in understanding their responsibilities under the ADA.

Such a coordination council does not exist, however, for Title VI and Title IX. The basis for such a coordination council is present in the U.S. Department of Justice's (DOJ) responsibility under Executive Order 12,250 to coordinate Title VI and Title IX efforts governmentwide.

Proving Discrimination

OCR believes that a key to ensuring compliance with civil rights laws is understanding what constitutes discrimination. If State education agencies and school systems understand the elements OCR considers in its complaint investigations and compliance reviews, they can proactively monitor their policies and procedures and the services provided to students to ensure that all are nondiscriminatory. OCR has recognized the importance of educating DOEd beneficiaries on its approaches to proving discrimination. According to Assistant Secretary Norma Cantú, OCR "ha[s] begun to share [its] investigative guidance with the public so that they know what our rules are."[70] OCR has several different approaches to proving discrimination, depending on the type of case and issues involved. Although there may be criticism of some of the approaches, these are theories used by OCR based on its understanding of current law.

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[63]29 U.S.C. § 794a(a)(2) (1988).

[64]*See* 42 U.S.C. § 2000d-1 (1988).

[65]*See, e.g.*, Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981); Helms v. McDaniel, 657 F.2d 800 (5th Cir. 1981), *reh'g denied*, 664 F.2d 291 (5th Cir. 1981), *cert. denied* 102 S. Ct. 1443, 455 U.S. 946, 71 L. Ed. 2d 658 (1981); Anderson v. Banks, 520 F. Supp. 472 (D.C. Ga. 1981); Philipp v. Carey, 517 F. Supp. 513 (D.C. N.Y. 1981); Halderson v. Pennhurst State Sch. and Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd in part on other grounds*, 612 F.2d 84 (3d Cir. 1979), *rev'd on other grounds*, 101 S. Ct. 1531, 451 U.S. 1, 67 L. Ed. 2d 694, *on remand*, 673 F.2d 647 (3d Cir. 1982).

[66]29 U.S.C. § 794a(a)(1) (1988).

[67]29 U.S.C. § 794a(b) (1988).

[68]29 U.S.C. § 794c(a) (Supp. V 1993). Members of the Council include the Secretary of Education, the Secretary of Health and Human Services, the Secretary of Labor, the Secretary of Housing and Urban Development, the Secretary of Transportation, the Assistant Secretary of Transportation, the Assistant Secretary of the Interior for Indian Affairs, the Attorney General, the Director of the Office of Personnel Management, the Chairperson of the Equal Employment Opportunity Commission, the Chairperson of the Architectural and Transportation Barriers Compliance Board, and such other officials as may be designated by the President. *Id.*

[69]29 U.S.C. § 794c(b) (Supp. V 1993).

[70]Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, interview in Washington, DC, July 30, 1996, p. 4 (hereafter cited as Cantú interview).

Title VI—Generally

Generally, OCR relies on two theories of discrimination when investigating Title VI complaints: disparate treatment and disparate impact.[71] Historically, courts and OCR have applied to Title VI cases the burden of proof tests associated with these theories that developed under Title VII of the Civil Rights Act of 1964.[72] Disparate treatment, also known as intentional discrimination, occurs when the recipient[73] of Federal funds takes an adverse action against the complainant because of the complainant's protected status.[74] Disparate impact occurs when a recipient's facially neutral policy adversely affects one protected group more than another, or a protected group more than an unprotected group, without an educational justification.[75] Disparate impact cases do not require proof of the recipient's discriminatory motive.[76] OCR is responsible for developing the investigation and analysis for the complaints and compliance reviews based on these theories.

Disparate Treatment. OCR's Title VI regulations prohibit disparate treatment in a variety of activities related to federally assisted education programs.[77] The Title VI regulations prohibit recipients from, on the basis of race, color, or national origin, denying services or benefits, providing services in a different manner, restricting the enjoyment of services or benefits, or denying any individual an opportunity to participate in a federally assisted program. The disparate treatment approach may be pursued on an individual basis or as part of a class action or pattern or practice investigation.

Under a disparate treatment analysis, the complainant must prove that the recipient intentionally discriminated. However, a complainant need not provide direct proof of intentional discrimination and may rely on circumstantial evidence to establish discrimination by inference.[78] The law remains uncertain regarding the extent of the complainant's burden and the type of evidence required to support the claim.[79]

Under Title VI, a complainant who alleges intentional discrimination may initially establish a prima facie case of discrimination by demonstrating each of four key elements. First, the complainant must demonstrate that he or she is a member of a protected class based on either race, color, or national origin. Second, the complainant must show that he or she was qualified to receive the benefits, aid, or services of the federally assisted program. This element may be satisfied by a variety of activities that demonstrate opportunity, such as meeting eligibility requirements or completing appropriate applications. Next, the complainant must demonstrate that he or she was either denied an opportunity to participate, limited in his or her ability to participate, denied access to benefits or services, or rejected from participating in the federally assisted program. Finally, the complainant must show that the benefits, aid, or services of the federally assisted program remained available or accessible to others.[80]

While the complainant's initial burden in disparate treatment cases under both Title VII and Title VI has remained consistent, the courts have continued to debate

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[71]Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to all staff, "Minority Students and Special Education," July 6, 1995 (hereafter cited as OCR, "Minority Students and Special Education"); Richard D. Komer, Deputy Assistant Secretary for Policy, Office for Civil Rights, U.S. Department of Education, memorandum to OCR Regional Civil Rights Directors, "Ability Grouping Investigative Procedures Guidance," (Draft) Mar. 14, 1991 (hereafter cited as OCR, "Ability Grouping Investigative Procedures Guidance").

[72]*See* 42 U.S.C. § 2000e-17 (1988 and Supp. V 1993). *See also* OCR, "Minority Students and Special Education" (citing Guardians Ass'n v. Civil Service Commission, 463 U.S. 582 (1983); Castaneda v. Pickard, 781 F.2d 456 (5th Cir. 1986); Georgia State Conferences of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); and Dillon County Dist. No. 1 and South Carolina State Dep't of Educ., No. 84-VI-16 (Civil Rights Reviewing Authority 1987) (Policy Codification System Doc. No. 180).

[73]For purposes of this discussion, "recipient" represents any and all possible respondents to a Title VI complaint, such as subrecipients.

[74]International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

[75]Bd. of Educ. v. Harris, 444 U.S. 130, 151 (1979) (in disparate impact cases in the education context, defendants are required to show an educational necessity instead of a business necessity). *See* International Bhd. of Teamsters v. United States, 431 U.S. at 335-36 (establishing Title VII business necessity analysis). *See also* OCR, "Minority Students and Special Education."

[76]International Bhd. of Teamsters v. United States, 431 U.S. at 335-36, n.15.

[77]34 C.F.R. § 100.3(b)(1)(i)-(vi) (1995).

[78]For disparate treatment cases relying on indirect and circumstantial evidence, *see* McDonnell Douglas v. Green, 411 U.S. 792 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); and Hicks v. St. Mary's Honor Ctr., 113 S. Ct. 2742 (1993).

[79]For disparate treatment cases relying on direct evidence, *see* Dothard v. Rawlinson, 433 U.S. 321 (1977); and International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991). The Civil Rights Act of 1991 does not address the burden of proof in disparate treatment cases. The act does, however, address damages in cases of intentional discrimination. Pub. L. No. 102-166, 105 Stat. 1071, 1072 (codified at 42 U.S. C. § 1981a (Supp. V 1993)).

[80]*See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

what role the initial burden has in ultimately proving intentional discrimination.[81]

Disparate Impact. OCR describes disparate impact cases as involving facially neutral policies that, either intentionally or unintentionally, have an adverse effect on a protected class.[82] Policies, procedures, or practices that do have a disparate impact on the basis of race, color, or national origin must be educationally justified. The disparate impact approach requires OCR to establish whether there has been a disproportionate denial of opportunity to benefit from a program. Next, OCR must determine whether this is due to a neutral policy, process, or practice and which specific aspect of that policy, process, or practice led to the disproportion. This initial step is called the prima facie case.[83] This prima facie case creates an inference of discrimination that shifts the burden of persuasion to the respondent to show that the policy, practice, or procedure is educationally necessary or justifiable and whether a less discriminatory alternative exists.[84]

Title VI—Ability Grouping

Using the presumption established by the Supreme Court in *Keyes v. School District No. 1*,[85] complainants

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[81]In a 1993 Title VII case, the Supreme Court clarified the respective burdens of complainants and respondents once the prima facie case is established. In *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993), the Supreme Court revisited the precedents established in *McDonnell Douglas Corp. v. Green* and *Texas Department of Community Affairs v. Burdine*.

Justice Scalia, writing for the five-justice majority in *Hicks*, held that if the complainant successfully demonstrates a prima facie case of intentional discrimination by direct or circumstantial evidence, a rebuttable presumption of intentional discrimination is created. Hicks v. St. Mary's Honor Ctr., 113 S. Ct. 2742, 2747 (1993). According to the Court, the presumption is merely a court-created procedural device that allows a conclusion to be drawn from the asserted facts and shifts the burden of producing evidence to the respondent. However, the complainant always maintains the ultimate burden of persuading the trier of fact that the respondent intentionally discriminated. 113 S. Ct. at 2747-48. Once the presumption of intentional discrimination is established, the respondent must produce evidence of a legitimate, nondiscriminatory explanation for the adverse action, and that evidence must rebut the presumption. 113 S. Ct. at 2747. The respondent need only present evidence of a legitimate reason and need not demonstrate that he or she was actually motivated by the nondiscriminatory reasons offered. 113 S. Ct. at 2749. If the respondent produces such evidence, then the complainant must be able to show that the nondiscriminatory reasons offered by the respondent were merely a pretext for intentional discrimination. 113 S. Ct. at 2747. According to a majority of the Supreme Court, a complainant cannot demonstrate that the nondiscriminatory reasons were mere pretext unless he or she proves "both that the reason was false, *and* that discrimination was the real reason" for the adverse action. 113 S. Ct. at 2752 (emphasis deleted). To date, the Federal courts have not cited *Hicks* in a Title VI or an education case. However, because the earlier disparate treatment cases have been applied consistently to Title VI, it appears that the Federal courts will likely follow the recent clarifications.

[82]*See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) and Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Dayton v. Brinkman, 443 U.S. 526, 536 n.9 (1979); Columbia v. Penick, 443 U.S. 449, 464-465 (1979); Milliken v. Bradley 717, 725, 745 (1974).

[83]Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993); Griggs v. Duke Power, 401 U.S. at 431.

[84]In *Wards Cove* the Supreme Court clarified the balance of burdens by indicating that the complainant carried the ultimate burden of persuasion throughout the case as in disparate treatment cases. 490 U.S. at 659-60. *See also* Candace Kovacic-Fleischer, "Proving Discrimination After *Price Waterhouse* and *Wards Cove*: Semantics as Substance," 39 Am. U. L. Rev. 615 (1990). In the 1991 Civil Rights Act, Congress overruled much of the Court's decision in *Wards Cove*. 42 U.S.C. § 2000e (Supp. III 1991). The legislative history notes that "a number of other laws banning discrimination. . .are modeled after, and have been interpreted in a manner consistent with, Title VII. The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act." As examples of laws affected, the Committee cited the Americans with Disabilities Act of 1990 and the Age Discrimination in Employment Act and specifically referenced both disparate impact claims and mixed motive cases.

[85]413 U.S. 189, 208 (1973). In *Keyes*, the Court affirmed the use of race-conscious remedies in the context of school desegregation even when statutorily imposed segregation had not existed before. Although the Denver, Colorado, school system had never been operated under a State constitutional provision or law that mandated or permitted school segregation, many of the city's schools were segregated. In 1969 the school board adopted a voluntary plan for the desegregation of the predominantly black Park Hill section of the city. A new school board election resulted in a majority of the members opposed to the plan. Subsequently the district court, finding that the segregation in Park Hill had resulted from prior school board actions, ordered the desegregation of the Park Hill section. Those favoring integration sought desegregation orders for the remaining school in the district and the counting of Hispanic, as well as of black children, as minority students. The Supreme Court held that proof of segregation in a substantial portion of a school district would support a finding of a dual system, thus imposing an "affirmative duty" on school authorities "to effectuate a transition to a racially nondiscriminatory school system." 413 U.S. at 189. *Keyes* created a presumption of unconstitutional discrimination in situations where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of students, within the school system. 413 U.S. at 201. The Court also created the presumption, now generally referred to as the *Keyes* presumption, that a finding of segregative intent in a meaningful portion of a school system "creates a presumption that other segregated schooling within the system is not adventitious." 413 U.S. at 208. This

challenging grouping practices within schools under a disparate treatment analysis may argue successfully that vestiges of past discrimination presumptively invalidate a current system that perpetuates the effects of the prior intentional segregation. Thus, the existence of the continuing effects of prior discrimination establishes a prima facie case that shifts the burden of proof to the school district.[86] The standard under the equal protection clause creates an inference of current intent based on the continuation of the effects of past intentional discrimination. For example, plaintiffs may show a causal link between past discrimination and present ability grouping practices.

Under disparate impact theory in ability grouping cases, OCR's investigations usually involve three stages. First, the OCR investigator determines whether a school's within-school grouping or placement practice has the effect of segregating students.[87] To make this determination, OCR evaluates whether the practice results in a statistically significant number of racially identifiable classrooms. Generally, racially identifiable classrooms have a statistically disproportionate number of students of one race compared to the racial composition of the entire school population, the population of the district, or the grade level depending on the nature of the investigation. Generally, OCR uses a "rule of thumb" of 20 percent to determine if the disproportionality is statistically significant.[88] However, if the student population is small, or other factors are involved, OCR investigators may find a racially identifiable classroom at a 10 percent level.[89] OCR then uses complex statistical techniques to show that the racially identifiable classroom were unlikely to have occurred by chance.[90]

In the second stage of OCR's analysis, the investigator determines whether the grouping or placement practice is educationally justified using three main criteria.[91] First, the grouping practice must be based on nondiscriminatory objective measures that are educationally relevant for the purpose of the grouping. Objective measures treat minority and majority students equally, provide an objective assessment of student ability or achievement level, and pertain to the subject areas in which the grouping practice is applied. Second, the objective measures must be applied in a nondiscriminatory manner, so that, for example, students with the same test scores are grouped at the same level.[92] Third, the grouping must be validated by test scores or other reliable objective evidence indicating the educational benefits of the grouping or placement practice, such as improved academic achievement or mobility to higher level classes.[93]

Title VI—Lau *Cases*

In conducting its *Lau* compliance reviews,[94] OCR places its first priority on ensuring that school systems undertake "whatever programs are necessary to give the students access to the school's regular education program."[95] OCR seeks to accomplish this goal by evaluating the education programs developed and implemented by States and local school districts. In keeping with its priority on the delivery of education services to all students, the ultimate goal for OCR in conducting these reviews is ensuring that school systems are meeting their legal responsibilities to take affirmative steps on behalf of students whose primary language is other than English and who have limited English proficiency.[96] That responsibility stems from the 1970 guideline upheld by the U.S. Supreme Court in *Lau v. Nichols*.[97]

In *Lau*, the majority of the Court approved this guideline as being "reasonably related" to the objective of non-discrimination set forth in Title VI.[98] The majority's approval of this guideline meant that the Court and the executive branch had agreed in interpreting the statute to allow for an assessment of a school system's actions based on the *effects* of those actions on the students, specifically students' access to

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connection establishes a prima facie case of unlawful segregation and shifts to the school authorities the burden of proving that the other segregative situations were not intentional.

[86]Keyes v. School Dist. No. 1, 413 U.S. 189, 207 (1973).

[87]OCR, "Ability Grouping Investigative Procedures Guidance."

[88]Ibid.

[89]*See* Greg Martonik, Equal Opportunity Specialist, Office for Civil Rights, Region III, U.S. Department of Education, telephone interview, June 18, 1996 (hereafter cited as Martonik interview).

[90]OCR, "Ability Grouping Investigative Procedures Guidance."

[91]Ibid.

[92]Ibid.

[93]Ibid.

[94]OCR refers to its enforcement activities in ensuring civil rights compliance for students whose primary language is other than English with the name of the U.S. Supreme Court's holding in *Lau v. Nichols*, 414 U.S. 563 (1974). All current OCR enforcement policy derives its mandate from *Lau* and the U.S. Supreme Court's adoption of OCR's Title VI implementing regulations.

[95]Cathy Lewis, Acting Senior Enforcement Officer, U.S. Department of Education, Office for Civil Rights, interview in Washington, D.C., June 14, 1996 (hereafter cited as Lewis interview).

[96]*See* Lewis interview.

[97]*See* text accompanying nn. 41–44 for a discussion of *Lau v. Nichols* and the 1970 guideline.

[98]414 U.S. 563 (1974).

the regular education program being offered by the school district.

Lau and OCR's 1970 guidelines established disparate impact as the legal standard for evaluating a school district's education program. This standard may be analogized to the disparate impact standard enunciated by the Court in the employment setting in *Griggs v. Duke Power Co.*[99] In *Griggs*, the Court identified the appropriate legal standard under which an employer's actions may be evaluated under Title VII of the Civil Rights Act of 1964.[100] In the context of OCR's evaluation of a school district's education program, an impermissible (i.e., discriminatory) school district policy or educational practice would be one that results in a disparate impact or effect for students whose primary language is other than English and who have limited English proficiency as compared to their English-proficient peers. Thus, OCR's civil rights enforcement activities have rested on an effects theory since the time of the May 1970 memorandum that reflected OCR's first administrative interpretation of Title VI.

Section 1703(f) of the Equal Educational Opportunities Act and its interpretation by the Federal courts further establishes disparate impact as a guiding principle in determining whether a school district's alternative language program is meeting its legal obligations. This statute, along with Titles IV and VI, provides the civil rights framework for equal educational opportunity. All of these statutes ban discrimination. However, the Equal Educational Opportunities Act goes further than the other two statutes by introducing the notion of a *proactive remedial* plan that suggests something more than physical integration within its nondiscrimination provision. This provision refers to "appropriate action" as a means of ensuring nondiscrimination and civil rights compliance. The Equal Educational Opportunities Act emphasizes "appropriate action" as a means of achieving the civil rights compliance remedy for which it is named, equal educational opportunity. As originally proposed in 1972, this legislation sought to prevent and *remedy* civil rights violations and to promote nondiscrimination through an emphasis on the *quality* of education programs.[101]

The Federal courts have interpreted the Equal Educational Opportunities Act to require a showing of disparate impact.[102] A violation of § 1703(f) of the act

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[99]401 U.S. 424 (1971).

[100]42 U.S.C. § 2000e (1988). The U.S. Commission on Civil Rights has discussed this analogy in its report *The Fair Housing Amendments Act of 1988: The Enforcement Report*. There, the Commission wrote that: "By analogy from the Supreme Court's decision in *Griggs*, a complainant established a prima facie case of *disparate impact* [emphasis added] by showing that a neutral policy caused a disproportionate exclusion of a protected class [i.e., race, color, national origin, gender]. This prima facie case created an inference of discrimination that shifted the burden of persuasion to the respondent to show that the discrimination was justified by a business necessity. In *Wards Cove* the Supreme Court clarified the balance of burdens by indicating that the complainant carried the ultimate burden of persuasion throughout the case as in disparate treatment cases. In the 1991 Civil Rights Act, Congress overruled much of the Court's decision in *Wards Cove*." U.S. Commission on Civil Rights, *The Fair Housing Amendments Act of 1988: The Enforcement Report* (Washington, DC: U.S. Government Printing Office, September 1994), p. 161 (hereafter cited as U.S. Commission on Civil Rights, *Fair Housing Amendments Act of 1988*) (citing Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989), and the Civil Rights Act of 1991, 42 U.S.C. § 2000e (Supp. III 1991). Congress' overruling of *Wards Cove* restored the burden shift to the respondent to show that discrimination was justified by business necessity. Ibid.

[101]President Nixon specifically addressed his administration's goals with regard to equal educational opportunity when he first proposed the Equal Educational Opportunities Act in 1972. With this legislation, he sought to portray equal educational opportunity as an *alternative* to busing. As such, he introduced the proposed legislation in an address to the Nation by stressing, "It is time for us to make a national commitment to see that schools in the central cities are *upgraded* so that the children who go there will have just as good a chance to receive a quality education as do the children who go to school in the suburbs." Educational Opportunity and Busing: The President's Address to the Nation Outlining his Proposals, 8 Weekly Comp. Pres. Doc. 590 (Mar. 16, 1972). President Nixon's proposals with this legislation, therefore, shifted the emphasis from busing as a remedial scheme for civil rights violations to focus instead on the quality of education programs as a potentially more effective means of remedying past civil rights violations and at the same time preventing new ones.

[102]*See* Terri Lynn Newman, Comment, "Proposal: Bilingual Education Guidelines for the Courts and the Schools," 33 Emory L.J. 577, 594-595 n.87 (1984) (hereafter cited as Newman, Comment, *Proposal: Bilingual Education Guidelines*) (citing Martin Luther King Junior Elementary Sch. Children v. Michigan Bd. of Educ., 463 F. Supp. 1027, 1032 (E.D. Mich. 1978) (noting that under § 1703(f) "the connection between failure to take appropriate action and race need not be in the form of an allegation of racially discriminatory purpose but may also take the form of an allegation of racially discriminatory effect"); and Cintron v. Brentwood Union Free Sch. Dist., 455 F. Supp. 57, 63 (E.D.N.Y. 1978) (holding that a proposed restructuring of bilingual education plan violated § 1703(f) even though the purpose of the restructuring was to account for a reduction in qualified bilingual education teachers following a court order that stated that teachers were to be dismissed and that the order of dismissal was to be determined by their lack of seniority; more bilingual education teachers were released than English-speaking

may be found if four elements are proven.[103] First, a language barrier must exist. Second, this language barrier must impede the equal participation of the adversely affected group in the educational program. Third, the school must have failed to take appropriate action to overcome the language barrier faced by the adversely affected group. Fourth, the race, color, sex, or national origin of the group adversely affected by the language barrier must be the cause of the failure to take appropriate action. A violation of these four elements of section 1703(f) denies children the right of equal participation by failing to overcome language barriers.[104] The act provides a remedy to this denial of equal or effective participation by requiring that language barriers be overcome.[105]

The Fifth Circuit in *Castaneda v. Pickard*,[106] enhanced Federal judicial interpretation of the act by providing a pragmatic approach to defining the meaning of "appropriate action." OCR's use of the *Castaneda* standard provides a sound and appropriate basis for civil rights enforcement activities. The soundness and appropriateness of the *Castaneda* standard as a basis for civil rights enforcement activities derives principally from its reliance on an *effects* test developed earlier by the U.S. Department of Health, Education, and Welfare's Office for Civil Rights in its May 1970 memorandum and adopted by the U.S. Supreme Court in *Lau*. In addition, OCR may rely on the *Castaneda* framework in finding a violation where a school district is engaging in differential *treatment* based on national origin in the implementation of an educational practice or program.[107]

In adopting the *Castaneda* standard for determining whether the school district has taken "appropriate action," OCR's analytical approach to evaluating education programs reflects the act's emphasis on schools' efforts to overcome language barriers. Under the *Castaneda* standard, school districts must develop programs and services that are properly implemented and provide access to the school's regular education program. Therefore, OCR may find a civil rights violation where a school district does not meet its obligation to take "appropriate action" either by failing to implement properly its education program, including differential treatment in specific program practices, for students with limited English proficiency. In addition, OCR may find a violation where a school district fails to achieve equal participation in the school's regular education program for such students. OCR may, therefore, establish noncompliance on the basis of the

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teachers, thus causing a disparate impact in the bilingual program)).

[103]Newman, Comment, *Proposal: Bilingual Education Guidelines*, p. 595 (citing Martin Luther King Junior Elementary Sch. Children v. Michigan Bd. of Educ., 463 F. Supp 1027, 1030-31 (E.D. Mich. 1978)).

[104]*See* Newman, Comment, *Proposal: Bilingual Education Guidelines*, p. 595 n.90 (citing Rios v. Reed, 480 F. Supp. 14, 22 (E.D.N.Y. 1978) (stating that the statutory obligation under § 1703(f) to provide equal educational opportunity required that children *must* be given the same opportunity to learn as their classmates who speak English. The court thus implied a right to an alternative language education program as a means of providing limited-English-proficient children equal participation in the schools)).

[105]*See* Newman, Comment, *Proposal: Bilingual Education Guidelines*, p. 595.

[106]648 F.2d 989 (5th Cir. 1981).

[107]Under a disparate treatment analysis, OCR must prove that the school district intentionally discriminated against an individual or group of individuals on the basis of race or national origin. OCR's Title VI regulations state that a recipient under any federally funded program may not "directly or through contractual service or other arrangements, on ground of race, color, or national origin: (i) [d]eny an individual any service, financial aid, or other benefit provided under the program; (ii) [p]rovide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program." 34 C.F.R. § 100.3(b)(1)(i)-(ii) (1995).

In the context of the *Castenada* framework, OCR may find that a school district is failing to implement properly its education program if it is engaging in disparate impact based on race or national origin. For example, if a school district treats students or parents who are members of a racial or national origin group differently from other similarly situated students or parents who are not members of a racial or national origin minority group in implementing a particular educational practice, such as parental notification, identification and assessment, or teacher allocation, without providing a legitimate justification, then it is engaging in an impermissible practice. *See, e.g.*, Paula Kuebler, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, to Dr. Dennis Clancy, Superintendent, Franklin Township Public Schools, Somerset, NJ, re: Case No. 02–92–1004, Mar. 6, 1972. OCR addressed a complaint by using a disparate treatment analysis in reviewing the alleged facts. The LOF states in pertinent part that: [t]he complainant alleges that the discriminatory policies and practices take two forms: (1) District policy and procedures require that Asian students whose names are identifiable as Asian in origin be treated differently by being tested as limited English proficient (LEP); and (2) the District does not properly evaluate Asian national origin students. . . ." Ibid., p. 1. The LOF concludes that: "[b]ased on the information summarized above, OCR finds that the District has not treated Asian students or parents, or LEP/ESL students in general, differently on the basis of race or national origin. Therefore, OCR has determined that the District is in compliance with Title VI, at 34 C.F.R. § 100.3(a) and (b)(1)(ii) and (v) and (b)(2)." Ibid., p. 8.

resulting adverse effects, or disparate impact, on these students.

Title IX

Disparate Impact. Disparate impact is one of the most frequently used civil rights theories applied to the education of girls in mathematics and science. During this analysis, OCR's concern is based on the statistical representation of girls and minorities in mathematics and science courses. The achievement level of those students, once they are proportionately represented in those classes, is not a concern during an investigation.[108] OCR only evaluates achievement levels as they relate to participation in or access to advanced courses.[109] For example, if a certain grade is required as a prerequisite for a course, OCR would look to see if students being placed in that particular class had the grades required by that class, or to see if qualifying students were not being placed. OCR does not look at the achievement levels of students in a single course. OCR investigates to determine if there are comparable teachers and opportunities to achieve across all course levels.[110]

OCR's first step in analyzing underrepresentation is to determine if a district places or admits females, minorities, and/or limited-English-proficient students in upper level mathematics and science courses at a rate adversely disproportionate to their overall relevant student enrollment. OCR must determine whether there is any significant underrepresentation of females and minorities in each upper level mathematics and science course.[111] To make this determination, OCR initially analyzes the overall enrollment data of the school or school district and compares those numbers to the enrollment of minorities, females, and limited-English-proficient students in advanced mathematics and science classes.[112] If significant disparities exist with underrepresentation of minorities and not females, then OCR should no longer review the district's Title IX compliance status. Similarly, a region should no longer review the district's Title VI compliance status if significant disparities exist only with the underrepresentation of females, nor should it continue to review science courses if disparities only exist in mathematics, and vice versa.[113]

"Once OCR has determined which upper-level mathematics and science course are significantly disproportionate, it should analyze all prerequisite course enrollments, by either race or gender, to determine whether females, minorities, and/or limited-English proficient students have taken prerequisite courses at different rates. If the percentage of female, minority, and limited-English proficient students who took the prerequisite courses is not significantly different from the percentages of these students in the upper-level course(s), OCR will generally treat any upper-level underrepresentation as educationally justified. OCR will, however, carefully examine whether students were improperly excluded from the prerequisite courses."[114]

The burden to identify a particular practice that is causing the disparate impact lies with OCR.[115] Practices or policies that may have a disparate impact against females in upper level mathematics and science courses are usually identified through onsite visits, and after thoroughly analyzing data requested from the district or school.[116] If OCR identifies discrimination in the underrepresentation of girls in mathematics and science, the school district must show that the underrepresentation is justified by an educational necessity.[117] If the school district cannot show educational justification, then OCR can find the school district in violation of Title IX.[118]

Disparate Treatment. Another civil rights theory frequently applied to the underrepresentation of females in mathematics and science is disparate treatment analysis. OCR analyzes the underrepresentation issue to determine whether there is any evidence of differential treatment that adversely affects enrollment of females in mathematics and science courses.[119] For example, differential treatment could include such techniques as steering by counselors, discriminatory promotional

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[108]Robert Ford, Team Leader for Mathematics and Science, U.S. Department of Education, Office For Civil Rights, Region III, interview, June 11, 1996 (hereafter cited as Ford interview).

[109]Sherry Goldbecker, Issue Coordinator for Minorities and Women in Mathematics and Science, Office for Civil Rights, U.S. Department of Education, interview, May 30, 1996 (hereafter cited as Goldbecker interview).

[110]Ibid.

[111]Office for Civil Rights, U.S. Department of Education, Draft, "Investigative Manual: Underrepresentation of Females and Minorities in Upper-Level Mathematics and Science in Secondary Schools," August 1994, prepared by Expert Team on Underrepresentation of Women and Minorities in Mathematics, Science, and Other High Track Courses, pp. 6–8 (hereafter cited as OCR, "Investigative Guidance on Females and Minorities in Math and Science").

[112]Ford interview.

[113]OCR, "Investigative Guidance on Females and Minorities in Math and Science," p. 7.

[114]Ibid.

[115]Ford interview.

[116]Ibid.

[117]OCR, "Investigative Guidance on Females and Minorities in Math and Science," p. 7.

[118]Ibid.

[119]Ibid., p. 8.

materials, lack of course offerings, and/or lack of computer and lab assistance at racially identifiable schools.[120] Any differential treatment that adversely affects the enrollment of females in upper level mathematics and science courses and that is not the result of a legitimate, nondiscriminatory action on the part of the recipient would violate Title VI and/or Title IX.[121]

Section 504

OCR's approach to clarifying what constitutes discrimination under section 504 differs considerably from its approach under Title VI and Title IX. In the context of elementary and secondary education, OCR has incorporated the concepts of equal educational opportunity and free appropriate public education into its nondiscrimination provisions.[122] Further, the specificity of the section 504 regulations guides OCR's analytical approach to these concepts and its determination of whether a recipient has engaged in discriminatory action.[123]

OCR's first step is to consider whether the individual is a "qualified handicapped person" based on the meaning provided in the section 504 regulations. In terms of public elementary and secondary education, OCR considers a student "qualified" using an "age appropriate" standard. Generally, as long as a student with a disability is of the age at which nondisabled children and youth receive educational services, the student is "qualified."[124] OCR's second step is to determine whether the student has a disability under section 504. OCR defines a "handicapped person" as one who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.[125] OCR considers whether a student's situation or condition fits under this definition. It has recognized disabilities, such as learning disabilities, mental retardation, and emotional or mental illness, as covered under section 504.[126]

Depending on the circumstances of a given case, OCR may then apply a disparate treatment, disparate impact, or a free appropriate public education (FAPE) analysis in determining whether a school's action constitutes discrimination.[127] OCR's analyses largely

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[120]Ibid.

[121]Ibid.

[122]The provisions outlining the requirements for a free appropriate public education are in subpart D of the regulations, the subpart which is an application of the nondiscrimination principles in subpart A in the context of preschool, elementary, and secondary education. *See* U.S. Department of Education, Office for Civil Rights, *OCR Handbook For The Implementation of Section 504 of the Rehabilitation Act of 1973, April 1981*, p. 44 ("Subpart A, Section [104.4] outlines actions that are prohibited by Section 504. The provisions of Subparts B, C, D, E, and F are simply applications of these principles."). *See also* ibid., p. 81 (a violation of a provision of subpart D will always be a violation of the nondiscrimination provisions in subpart A, 34 C.F.R. § 104.4).

[123]*See* 34 C.F.R. §§ 104.4, 104.33, & pt. 104, app. A, subpt. A (1995).

[124]The handicapped student is "qualified" if he or she is (i) of the age at which schools provide education to nondisabled students, (ii) of the age at which State law requires that students with disabilities receive educational services, or (iii) is a student to whom the State must provide a free appropriate public education under the IDEA. 34 C.F.R. § 104.3(k)(2) (1995).

[125]34 C.F.R. § 104.3(j) (1995). In the section 504 regulations, OCR has defined the term "physical or mental impairment" as follows:

(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 34 C.F.R. § 104.3(j)(2)(i) (1995).

It has defined "major life activities" as functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 34 C.F.R. § 104.3(j)(2)(ii) (1995).

[126]34 C.F.R. § 104.3(j)(2)(i)(B) (1995).

[127] Some courts do not consider the denial of a free appropriate public education a basis for finding discrimination in violation of Section 504. *See, e.g.*, Monahan v. Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982) (stating that a violation of Section 504 must be based on something more than a mere failure to provide FAPE).

However, in practice, OCR does resolve complaints relying on a denial of FAPE based on the Section 504 regulations. *See, e.g.*, Shary Martin, Compliance Team Leader, Office for Civil Rights, Region II, U.S. Department of Education, letter to Dr. Mark E. DeSanctis, Superintendent, Westhill Central School District, Syracuse, New York, re: Compliant No. 02-94-1071, May 22, 1995; Lillian Guitierrez, Acting Regional Director, Office for Civil Rights, Region VIII, U.S. Department of Education, letter to David Salazar, Superintendent, West Las Vegas School District, Las Vegas, New Mexico, re: Complaint No. 08-93-1142, Nov. 30, 1993, 20 IDELR 1409. OCR's 504 Handbook states that a violation of the FAPE provisions at subpart D will always be a violation of the Section 504 nondiscrimination provisions; however, not all violations of the nondiscrimination provisions will violate the FAPE provisions. *See* Office for Civil Rights, U.S. Department of Education, "OCR Handbook for the Implementation of Section 504 of the Rehabilitation Act of 1973," prepared by CRC Education & Human Development,

are guided by the nondiscrimination and FAPE provisions in the section 504 regulations. Under the disparate treatment analysis, OCR considers whether a recipient treated a person differently solely because of the person's disability.

The different treatment may occur in many ways:

- denying a "qualified handicapped person an opportunity to participate in or benefit from an aid, benefit, or service" provided by that recipient,[128]
- providing different or separate aid, benefits, or services;[129]
- denying a "qualified handicapped person the opportunity to participate as a member of planning or advisory boards;"[130] or
- limiting a "qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others."[131]

If the different treatment is found to be solely because of the person's disability, it will not necessarily constitute discrimination. If a school has a legitimate reason for taking action because of the disability, different treatment is permissible. For example, different treatment may be necessary to provide the student with aid, benefits, or services in a nondiscriminatory manner and to afford the student an equal educational opportunity.[132]

Under the disparate impact analysis, OCR considers whether a neutral policy, criterion, or procedure has an adverse impact on students with disabilities. If so, the school district must provide a justification for its practice demonstrating that it is educationally necessary.[133] Disparate impact cases may appear in several ways. The school or State education agency may be using criteria or methods of administration that have the effect of subjecting a "qualified handicapped" student to discrimination.[134] The student may be:

- denied an opportunity to participate in a class, program, service, or activity;[135]
- afforded an education that is not equal nor as effective as that provided to others;[136] or
- limited in the enjoyment of a right, privilege, advantage, or opportunity enjoyed by others.[137]

Generally, the primary section 504 analysis on which OCR relies in elementary and secondary education cases is the FAPE analysis. Under the FAPE analysis, OCR determines whether the recipient provided the student with a free appropriate public education.[138] OCR defines a free[139] appropriate

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Inc., Ellen R. Delany, J.D., Project Director, and Long and Silverstein, P.C., Robert J. Silverstein, J.D., April 1991, p. 81.

[128]34 C.F.R. § 104.4(b)(1)(i) (1995).

[129]34 C.F.R. § 104.4(b)(iv) (1995).

[130]34 C.F.R. § 104.4(b)(vi) (1995).

[131]34 C.F.R. § 104.4(b)(1)(vii) (1995). *See also* U.S. Department of Education, Office for Civil Rights, *OCR Handbook For The Implementation of Section 504 of the Rehabilitation Act of 1973, April 1981*, p. 93 (Section [104.4(b)(1)(vii)] also implements a basic objective of section 504: that handicapped persons be free to lead independent and self-sufficient lives, to the maximum extent possible.").

[132]*See* 34 C.F.R. § 104.4(b)(iv) (1995) (recipients are prohibited from providing different or separate aid, benefits, or services to handicapped persons unless such action is necessary to provide a qualified handicapped person with aid, benefits, or services that are as effective as those provided to others).

[133]*See, e.g.*, New Mexico v.Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847 (10th Cir. 1982).

[134]34 C.F.R. § 104.4(b)(4) (1995).

[135]34 C.F.R. § 104.4(b)(1)(i) (1995).

[136]34 C.F.R. § 104.4(b)(1)(ii)-(iii) (1995). The section 504 regulations clarify that "to be equally effective, [the aids, benefits, and services] are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs." *Id.* § 104.4(b)(2).

[137]34 C.F.R. § 104.4(b)(1)(vii) (1995).

[138]*See* 34 C.F.R. § 104.33(a) (1995) ("A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap."). The denial of FAPE is based on the section 504 provision on FAPE, 34 C.F.R. § 104.33(b), and the section 504 provisions prohibiting discrimination, 34 C.F.R. § 104.4(b)(1)(i)-(iv), (vii). OCR, "Minority Students and Special Education," p. 41. *See also* George Cole, Special Project Team Member, Vicki Johnson, Staff Attorney, and Rusty Rayfield, Equal Opportunity Specialist, Office for Civil Rights, Region VI, U.S. Department of Education, telephone interview, June 26, 1996, p. 6 (There are generally two approaches to discrimination under section 504, a general approach and a section 504 FAPE approach.).

The denial of FAPE analysis, therefore, can be based on disparate treatment or disparate impact theories of discrimination. *See* New Mexico Ass'n for Retarded Citizens v. State of New Mexico, 678 F.2d 847, 853-54 (10th Cir. 1982) (disparate impact) (The court of Appeals for the Tenth Circuit relied on the U.S. Supreme Court case, Southeastern Community College v. Davis, 442 U.S. 397 (1979), and other case authorities to note that "a federally-funded education system may be found in violation of section 504 where the entity's practices preclude the handicapped from obtaining system benefits realized by the nonhandicapped." The court used two Title VI cases that applied a disparate effects test, Lau v. Nichols, 414 U.S. 563 (1974), and Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974), as analogous illustrations of the section 504 analysis. Further, the court noted that it found "no language in the statute or regulations suggesting that proof of disparate treatment is essential to establishing a section 504 infraction in connection

education as "the provision of regular or special education and related aids and services that (i) are designed to meet the individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based on upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36."[140] Based on that definition, OCR considers several issues:

(1) whether the education, aids, and services provided by the school meet the individual needs of the disabled student as adequately as the school meets the needs of nondisabled students;[141]

(2) whether the disabled student has been educated and provided nonacademic and extracurricular services in the least restrictive environment to the maximum extent appropriate to that student's needs;[142]

(3) whether facilities identified for disabled students and the services and activities provided in them are comparable to other facilities, services, and activities provided by the school;[143]

(4) whether a school's evaluation of a student who is believed to need special education or related services, because of a disability, follows requisite procedures;[144]

(5) whether a school's actions in making placement decisions follows requisite procedures;[145] and

(6) whether a school has established and implemented certain procedural safeguards.[146]

Violation of the regulatory provisions underlying any one or more of these issues is a basis for OCR to determine that a school has denied a student with a disability a free appropriate public education and, thus, has discriminated against that student.[147] Because the definition of a free appropriate public education is based, in part, on adherence to certain section 504 procedures, many of the FAPE analyses for these six issues use a procedural approach. As a result, a finding that a school district has denied a student a free appropriate public education often involves a finding of a procedural violation.[148]

Title VI and Section 504: Overrepresentation of Minority Students in Special Education

OCR approaches overrepresentation of minority students in special education using the same Title VI disparate impact analysis applied in ability grouping cases.[149] OCR looks not only at the issue of overrepresentation of minority students in special education generally, but also at overrepresentations based on classifications of disabilities and disparities within disability classifications.[150] For example, where OCR finds that a disproportionately larger number of white students are identified as learning disabled and a disproportionately larger number of black students are identified as mentally retarded, OCR will conduct further investigation to determine if the disparity is the result of discrimination.[151] OCR also addresses disparities within a disability classification, such as differences in placement settings. For example, where OCR finds that white learning disabled students are receiving regular education programs with the use of resource rooms, while minority learning disabled students are in self-contained classes, OCR will conduct further investigation using the Title VI impact analysis

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with the educational rights of handicapped children." 678 F.2d at 854.) *See also* Begay v. Hodel, 730 F. Supp. 1001 (D. Ariz. 1990). However, one case arising in another judicial circuit implies that proof of intentional discrimination is necessary. *See* Georgia State Conference of Branches of NAACP v. State of Georgia, 775 F.2d 1403 (11th Cir. 1985).

[139]The regulations specify that a free education is one "without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian." 34 C.F.R. § 104.33(c)(1) (1995). It may consist of either the provision of free services or payment for the costs of a program not operated by the recipient. *Id.*

[140]34 C.F.R. § 104.33(b)(1) (1995).

[141]*See* 34 C.F.R. § 104.33(b)(i) (1995).

[142]*See* 34 C.F.R. § 104.34(a)-(b) (1995).

[143]*See* 34 C.F.R. § 104.34(c) (1995).

[144]*See* 34 C.F.R. § 104.35(a)-(b) (1995).

[145]*See* 34 C.F.R. § 104.35(a),(c) (1995).

[146]*See* 34 C.F.R. § 104.36 (1995).

[147]*See* U.S. Department of Education, Office for Civil Rights, *OCR Handbook For The Implementation of Section 504 of the Rehabilitation Act of 1973, April 1981*, p. 81 (a violation of a provision of subpart D will always be a violation of the nondiscrimination provisions in subpart A, 34 C.F.R. § 104.4).

[148]*See* Carolyn Madsen, Staff Attorney, Office for Civil Rights, Region X, U.S. Department of Education, telephone interview, June 10, 1996, p. 23 (because section 504 is written with an emphasis on procedures, denial of FAPE means that there was something improper in the way a school district identified, evaluated, placed, or provided the parent due process rights in terms of how it served a student).

[149]*See* text accompanying nn. 85–93 above.

[150]Lee Nell, Chief Regional Attorney, Office for Civil Rights, Region III, U.S. Department of Education, telephone interview, June 11, 1996, p. 21 (hereafter cited as Nell interview); Steve Pereira, Chief Civil Rights Attorney, Office for Civil Rights, Region II, U.S. Department of Education, telephone interview, June 17, 1996, p. 6 (hereafter cited as Pereira interview).

[151]Nell interview, p. 21.

to determine whether the placements are discriminatory.[152]

OCR considers adherence to section 504 an integral part of its investigations under Title VI when considering overrepresentation of minority students in special education programs because school districts often point to compliance with section 504 as the justification for their actions.[153] Therefore, OCR investigators may be conducting simultaneous Title VI and section 504 investigations. With the section 504 aspect, OCR takes a procedural approach and considers whether all the requirements relating to evaluation and placement have been met. If OCR finds that a school district's procedures for evaluation and placement decisionmaking do not comply with the section 504 regulations, OCR will find the school district in violation of section 504. Depending on the circumstances of the case, it may be an individual violation in the school district's evaluation and placement of a student, or it may be a systemic violation of section 504 if the school district's general policies or procedures do not comply with the section 504 regulations. However, the section 504 violation will not necessarily lead to a finding of a Title VI violation unless OCR can first determine that the policies, procedures, or evaluation and placement practice that violated section 504 had a disparate impact on a particular racial or national origin group.[154]

OCR's General Responsibilities

These civil rights laws extend to a wide range of Federal recipients and beneficiaries. Recipients include 52 State education agencies; more than 15,000 local education agencies; approximately 7,500 postsecondary institutions, including proprietary schools and community colleges; 52 State rehabilitation agencies; as well as other institutions that receive Federal funds, including libraries, museums, and correctional facilities.[155] Beneficiaries are located in the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States.[156]

Although OCR seeks voluntary compliance with Federal laws, it can withhold Department of Education funding to a grantee who violates antidiscrimination laws.[157] Hence, grantees receiving funds from the Department of Education (e.g., Title 1, Star Schools, Early Education for Children with Disabilities, bilingual education) must comply with the civil rights statutes to receive their entire awarded funds in a timely fashion. OCR provides technical assistance to grantees, beneficiaries, the public, and other organizations to try to obtain voluntary compliance with civil rights laws.[158] OCR directs, coordinates, and recommends policy for duties performed by headquarters and the regional offices that can be classified as:

Administrative, Managerial, and Policy Duties

- Administer the provisions of legislation and Department of Education policy prohibiting discrimination based on race, religion, ethnicity, national origin, extent of English proficiency, gender, age, or disability;[159]
- Develop and recommend the adoption of regulations and policies of general applicability regarding civil rights;[160]
- Conduct research and surveys on civil rights issues and on the participation of minorities, women, the aged, and disabled persons in federally assisted education programs;[161]
- Assist other Department of Education offices in developing and implementing plans to meet civil rights objectives;[162]

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[152]*See* Pereira interview, p. 6. *See also* Mai Cavalli, Regional Issue Coordinator on Minorities in Special Education, Office for Civil Rights, Region IV, U.S. Department of Education, interview in Atlanta, GA, June 4, 1996, p. 3.

[153]OCR, "Minority Students and Special Education," p. 12.

[154]*See* Jonathan Rosenberg, Staff Attorney, Office for Civil Rights, Region II, U.S. Department of Education, telephone interview, June 19, 1996, p. 2. *See also* Barbra Shannon, Chief Regional Attorney, Office for Civil Rights, Region IV, U.S. Department of Education, telephone interview, June 3, 1996, p. 5 ("A violation of 504 does not automatically indicate an overrepresentation of minorities in special education.").

> If there are procedural violations, they are either individual violations of Section 504, or, if they are broadbased and serious enough, systemic violations under Section 504. If in turn those Section 504 violations, or other practices OCR identifies, are particular to a specific racial group or groups, and if the application is causing a disparate impact on a particular racial group, then that can cause a violation of Title VI as well. However, this analysis is very context specific.

[155]DOEd, *FY 1994 Implementation Plan*, p. 30.

[156]OCR, *FY 1994 Annual Report*, app. A.

[157]Stephen Sniegoski, *Know Your Government: The Department of Education* (New York: Chelsea House, 1988), p. 68.

[158]OCR FY 1996 Budget Request, p. Z-12.

[159]*1992 Mission Manual OCR/IO*, p. 1.

[160]*1992 Mission Manual OCR/IO*, p. 1.

[161]*1992 Mission Manual OCR/IO*, p. 1.

[162]U.S. Departments of Labor, Health and Human Services, Education, and Related Agencies, *Hearings on Appropriations before the Subcommittee on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the*

- Respond to Freedom of Information Act requests and to congressional inquiries related to specific cases—staff respond periodically to extensive data requests by congressional oversight committees and the U.S. General Accounting Office on a range of program operation and enforcement issues;[163] and
- Disseminate policy and technical materials, and provide a range of other legal, policy, and management support activities for the OCR enforcement program (e.g., maintain automated case tracking systems).[164]

Compliance Responsibilities

- Conduct investigations of complaints of discrimination, negotiate with schools and districts to secure voluntary compliance with legislative and regulatory civil rights requirements, and conduct other types of investigations in a prompt manner;[165]
- Conduct compliance review investigations—based on survey data and other indicators, select sites where there are potential problems of compliance with civil rights laws;[166] and
- Monitor corrective action plans—issue letters of findings, including corrective action violation letters of findings resulting from completed complaint and compliance review investigations. OCR staff monitor each corrective action plan to ensure that all parts of each plan have been implemented as agreed.[167]
- In connection with its compliance functions, OCR may enter into contracts with public or private entities or persons for assistance in meeting enforcement responsibilities.[168]

Enforcement Responsibilities

- Conduct administrative enforcement proceedings to secure compliance with civil rights requirements and refer cases to the Department of Justice for the initiation of court action if a recipient of Department of Education funds (a) fails to complete its resolution agreement or (b) is found in violation of the law and compliance cannot be achieved;[169]

Technical Assistance Responsibilities

- Provide information and other services designed to inform beneficiaries (e.g., parents and parent groups, State and local advocates, educational experts inside or outside of Department of Education, and other stakeholders interested in being empowered) of Federal education programs of their rights to facilitate voluntary compliance with civil rights laws and other responsibilities consistent with statutory and regulatory requirements;[170]
- Initiate outreach efforts with recipients of Department of Education programs and activities to (a) address recurring compliance problems and unique regional needs and (b) assist individuals in understanding their rights consistent with statutory provisions;[171] and
- Issue memoranda of understanding and other formal agreements with State education and human rights agencies designed to facilitate meeting mutual civil rights compliance objectives.[172]

In pursuing its civil rights enforcement responsibilities, OCR coordinates activities with other Federal agencies such as the Department of Justice, the Equal Employment Opportunity Commission, and the Federal Mediation and Conciliation Service.[173] OCR has been delegated civil rights enforcement authority by 11 other executive branch departments and agencies.[174] In addition, OCR coordinates activities with some of the Department of Education's program offices. For instance, OCR works with the Office of Elementary and Secondary Education to implement the civil rights provisions of the magnet schools assistance program.[175] OCR also coordinates with the Office of Special Education and Rehabilitative Services on issues related to disability.

OCR's Interaction with the Program Offices

Although OCR is the sole office within DOEd with civil rights enforcement responsibilities, there is some

House Appropriations Committee, 104th Cong., 1st Sess. 67 (1995), p. 1526 (hereafter cited as Hearings).

[163]Ibid.

[164]Ibid., p. 1523.

[165]Ibid., p. 1526.

[166]Ibid., p. 1525.

[167]Ibid., p. 1525.

[168]Ibid., p. 1525.

[169]Ibid., p. 1526.

[170]Ibid.; and Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to Senior Staff, "Development of the FY 1996 Enforcement Docket," Mar. 1, 1995, p. 3, submitted as part of Department of Education/OCR Response, Folder C (hereafter cited as OCR, "FY 1996 Enforcement Docket").

[171]*1992 Mission Manual OCR/IO*, p. 2; and OCR FY 1996 Budget Request, p. Z-13.

[172]OCR FY 1996 Budget Request, p. Z-13; OCR FY 1996 Budget Request, p. Z-13.

[173]OCR, *FY 1994 Annual Report*, app. A, p. 2.

[174]Ibid.

[175]Ibid., app. A, p. 3.

level of interaction between OCR and the program offices to assist OCR in its work. This interaction stems from program offices providing information or referrals to OCR. For example, when each applicant for financial assistance under a DOEd program completes its application package, it must sign an assurance that it will comply with civil rights laws. If the program office, in reviewing an application, receives information that an applicant or grantee may not be in compliance with civil rights requirements, the program office provides OCR with this information on which OCR can then conduct followup activities. If an applicant or grantee requests from the program office information or technical assistance on civil rights issues, the program office will refer that applicant/grantee to OCR.[176] As the program office's civil rights function is limited to this review of the assurance form, OCR's role in the grant review process also is limited. OCR reviews regulations proposed by program offices, including selection criteria, for civil rights concerns. DOEd's general administrative regulations which are used by many discretionary grant programs consider how the applicant will ensure that eligible project participants are selected without regard to race, color, national origin, gender, age, or disability.[177] However, OCR does not participate with the program offices in establishing criteria used to award Federal funds or in ensuring that equal educational opportunity principles are incorporated into that criteria.[178]

The interaction between OCR and the program offices also entails review of OCR draft regulations and policy documents to ensure that programmatic concerns are fully considered in the development of civil rights regulations and policy guidance. When OCR develops regulations or policy guidance, it provides these documents to the appropriate program offices for review before final issuance. For example, policy guidance on the provision of a "free appropriate public education" to students with disabilities would be reviewed by OSERS.[179]

Other than these two areas of interaction, OCR has little formal communication with the program offices except when their statutory duties coincide. For example, OCR has contact with the Office of Elementary and Secondary Education (OESE) relating to magnet school assistance programs.[180] OCR, however, maintains an active relationship with OSERS[181] and follows the memorandum of under-

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[176]Susan Craig, Assistant General Counsel, Division of Educational Equity and Research, Office of the General Counsel, U.S. Department of Education, to Frederick D. Isler, Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, response to U.S. Commission on Civil Rights' Request for Information, Feb. 1, 1996, General Attachment # 1 (hereafter cited as OCR, Information Request Response).

[177] 34 C.F.R. §75.210(b)(3)(v) (1995).

[178]The Office of Bilingual Education and Minority Language Affairs' (OBEMLA) former regulations did contain requirements that incorporated criteria essential to equal educational opportunity, such as parental notification, promotion of parental involvement, and teacher training. *See* 34 C.F.R. §§ 500.15, 500.21, 525.31, 501.42 (1994). However, DOEd withdrew these regulations as of July 1995. *See* Susan Craig, Assistant General Counsel, Division of Educational Equity and Research, Office of the General Counsel, U.S. Department of Education, to Frederick D. Isler, Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, response to U.S. Commission on Civil Rights' Request for Information, Feb. 1, 1996, "Office of Bilingual Education and Minority Languages Affairs," no. 4.

[179]OCR, Information Request Response, General Attachment # 1.

[180]OCR, Information Request Response.

[181]OSERS is responsible, in part, for the following statutes: section 504 of the Rehabilitation Act of 1973; the Equal Educational Opportunity Act of 1974, Pub. L. 93–380, 88 Stat. 515 (codified as amended at 20 U.S.C. §§ 1701–1714 (1974)); and the Education for All Handicapped Children Act of 1975, renamed in 1990 as the Individuals with Disabilities Education Act, Pub L. 94–142, 89 Stat. 775 (as amended) as renamed the Individuals with Disabilities Education Act, Pub. L. 101–476,104 Stat. 1143 (1990) (codified as amended at 20 U.S.C. §§ 1400–1485 (1988 & Supp. V 1993)). OSERS is responsible primarily for education programs that serve the needs of children, youth, and adults with disabilities. The programs supported by OSERS assist in educating infants and children with specified identified disabilities, such as behavioral, emotional, cognitive, speech-related, orthopedic, sensory-motor, or other impairments, and who have more comprehensive education and medical needs than students in a regular education classroom. OSERS administers several grant programs including the following programs related to elementary and secondary education:

- Early Education for Children with Disabilities
- Program for Children with Serious Emotional Disturbance (SED) (defined at 20 U.S.C. § 1401(a)(1) (1992).)
- Grants to States: "The Part B Program of IDEA"
- Handicapped Regional Resources and Federal Centers Program
- Services for Children with Deaf-Blindness
- Technology, Educational Media, and Materials for Individuals with Disabilities

OSERS' mission is to:

- Meet the needs and develop the full potential of children with disabilities through the provision of special education programs and services;
- Provide resources to rehabilitating youth and adults with disabilities, so that dependency can be reduced and productive capacity can be enhanced;
- Increase knowledge about, foster innovation in, and improve the delivery of services for persons with disabilities through the performance or through provision of independent living and vocational rehabilitation services;

standing between the offices closely.[182] OCR does not have formal memoranda of understanding with the other program offices.[183] On an informal basis, OCR staff members occasionally work with the Office of Educational Research and Improvement's (OERI) regional laboratories when negotiating resolutions or developing technical assistance materials.[184] However, this relationship is not consistently developed or utilized.

Based on the memorandum of understanding between OCR and OSERS, they "may undertake jointly, by mutual agreement, any or all of the following activities:

1. technical assistance;
2. investigation of any education agency;
3. the issuance of findings under the IDEA and section 504;
4. the negotiations of remedies for violations found;
5. the monitoring of compliance plans; and
6. appropriate enforcement proceedings."[185]

The memorandum of understanding further specifies that "[w]hen policy is being formulated, by either OCR or OSERS, on any issue concerning the provision of a free appropriate public education, every effort will be made to consult on the issue prior to issuance of the policy."[186] In practice, OCR has worked closely with the Office of Special Education Programs (OSEP) within OSERS when developing section 504 policy,[187] and it has issued joint policy memoranda and policy letters with OSERS.[188]

The memorandum of understanding specifies that the coordinators for the purposes of the joint agreement are, for OSERS, the Director of the Office of Special Education Programs, and for OCR, the Director of the Policy and Enforcement Service. The memorandum of understanding, however, reflects OCR's organizational structure existing prior to OCR's 1996 reorganization.[189] As a result, it is unclear which staff member serves as OCR's coordinator for the memorandum of understanding with OSERS under OCR's new organizational structure.

The memorandum of understanding outlines the process for handling complaints received by OCR or OSERS that may overlap with the other's responsibilities.[190] OSERS should refer to OCR all complaints it

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• Disseminate information about services, programs, and laws affecting persons who are disabled; and

• Provide information and technical assistance to State and local entities on best practices and model programs utilized by OSERS' non-Federal partners to improve the outcomes and efficiency of their service programs. *See* 1992 *Mission Manual OSERS*, p. 1.

OSERS also conducts research designed to (a) promote understanding of the origins, management, and treatment of a wide range of disorders; as well as (b) acquire additional knowledge about the biological, psychosocial, and socioeconomic implications of disabilities on the persons affected and their families. *See* 1992 *Mission Manual OSERS*, p. 1.

[182]Jean Peelen, Enforcement Director, Office for Civil Rights, DC Metro Office, U.S. Department of Education, interview in Washington, DC, May 28, 1996, p. 2 (hereafter cited as Peelen interview).

[183]OCR, Information Request Response. The Commission requested that OESE, OBEMLA, OSERS, and OERI provide copies of their memoranda of understanding with OCR. Only OSERS provided a memorandum of understanding.

[184]*See* Susan Bowers, Senior Enforcement Director, and former issue coordinator on testing issues, Office for Civil Rights, U.S. Department of Education, interview in Washington, DC, May 28, 1996, pp. 9–10.

[185]OSERS–OCR, Memorandum of Understanding, p. 2.

[186]Ibid.

[187]According to Jean Peelen, OCR works closely with the Office of Special Education Programs, particularly on the issue of minorities in special education, and OCR often taps into OSEP's resources. Peelen interview, p. 2. (Ms. Peelen is also the former issue coordinator for minorities in special education and former director of the Elementary and Secondary Education Policy Division in OCR's former Planning, Analysis, and Systems Service.)

[188]*See* Robert R. Davila, Assistant Secretary, Office of Special Education and Rehabilitative Services; Michael L. Williams, Assistant Secretary, Office for Civil Rights, and John T. MacDonald, Assistant Secretary, Office of Elementary and Secondary Education, U.S. Department of Education; joint policy memorandum, Sept. 16, 1991, 18 IDELR 116-19; and Thomas Hehir, Director, Office of Special Programs, and Jeannette J. Lim, Director, Policy, Enforcement and Program Service, Office for Civil Rights, U.S. Department of Education, to Michele Williams, Advocates for Children's Education, Miami, Florida, Mar. 14, 1994.

The memorandum of understanding specifies, "Whenever possible, the offices will issue jointly developed policy, after appropriate consultation with OGC." OSERS–OCR, Memorandum of Understanding, p. 2.

[189]*See* Brian C. Ganson, Special Assistant to the Assistant Secretary, Office for Civil Rights, U.S. Department of Education, interview in Washington, D.C., June 24, 1996, pp. 1-3 (discussing OCR's new organizational structure). *See also* discussion below on OCR's organizational structure.

[190]For OCR, "complaints" means written statements alleging facts which, if true, would constitute a violation of section 504. It does not include inquiries that only solicit OCR's interpretation of the law or OCR's policies. For OSERS, "complaints" means statements asking for the Department's investigation or intervention in a matter relating to a particular handicapped child or group of handicapped children, when those statements raise possible violations of part B of the IDEA. It does not include inquiries that only solicit OSERS's interpretation of the law or

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receives that allege facts which, if true, would constitute a violation of section 504 and/or section 504 and the IDEA. OCR should investigate referred complaints under its usual complaint procedures and report to OSERS on the results. OCR should investigate any complaint directly filed with OCR that alleges facts which, if true, would constitute a violation of section 504 alone, or both the IDEA and section 504. If, at the beginning of its investigation, OCR determines that the complaint, or part of the complaint, alleges a violation of the IDEA only, it should refer the complaint or the relevant portion to OSERS.[191]

The memorandum of understanding specifies that OCR and OSERS should exchange information and materials in the area of children and youth who have disabilities, for dissemination to OCR regional offices, Regional Resource Centers[192] and other OSERS technical assistance centers, as appropriate. OCR should provide information on its regional offices' addresses and technical assistance contact persons, its technical assistance training courses, products and materials from its central inventory, and reports containing technical assistance information. OSERS should provide information on scheduled events and meetings relating to the education of children with disabilities, OSERS staff technical assistance plans, services and activities of Regional Resource Centers, and products and materials related to technical assistance to students with disabilities.[193] The memorandum of understanding also recognizes that OCR and OSERS can engage in joint technical assistance activities, such as the development of materials and training packages and the participation in conferences.[194] The exchange of information and opportunity to conduct joint technical assistance activities is extremely useful. It offers OCR the opportunity for an improved understanding of the pedagogical aspects of educating children and youth with disabilities. It also provides informational resources that assist in developing remedies or offering alternative nondiscriminatory educational criteria and practices to schools.

OSERS's policies. OSERS–OCR, Memorandum of Understanding, p. 3.

[191]Ibid., pp. 3-4.

[192]Regional Resource Centers are facilities established under one of the IDEA Federal grants programs. These centers provide many services, in the nature of consultation, technical assistance, and training, to State educational agencies, local school systems, and other public agencies providing early intervention services. *See* 20 U.S.C. § 1421(a) (Supp. V 1993).

[193]OSERS–OCR, Memorandum of Understanding, p. 5.

[194]Ibid.

The Office for Civil Rights' Origin and Past Performance

From its inception in 1980, OCR has confronted a number of controversies and challenges in conducting its civil rights implementation, compliance, and enforcement activities. Political controversy and close judicial and congressional scrutiny have been major themes in OCR's history. In addition, changes in leadership,[195] and severe budgetary and staffing reductions[196] beginning in 1981, have reduced OCR's effectiveness in implementing and enforcing the Federal civil rights statutes with which Congress and the Executive Branch have entrusted it. Numerous reports document the impact of these factors on OCR's performance over the years.[197]

[195]U.S. House of Representatives, Committee on Education and Labor, *A Report on the Investigation of the Civil Rights Enforcement Activities of the Office for Civil Rights U.S. Department of Education*, December 1988 (Washington, D.C.: U.S. Government Printing Office, 1989), pp. 19-20 (hereafter cited as 1988 House Report on OCR) (noting that: "Office for Civil Rights has suffered severe changes in leadership since 1981 which have undoubtedly contributed to the inconsistency of its enforcement policies and confusion in and among its regional offices.) OCR's first then-Assistant Secretary since 1981 was Clarence Thomas, who left Office for Civil Rights in 1982 to Chair the Equal Employment Opportunity Commission. Thomas was succeeded by Harry Singleton, who served as then-Assistant Secretary from 1982 to 1985. Alicia Coro followed Singleton's tenure in 1986 and served as Acting then-Assistant Secretary until July 1987, when LeGree Daniels was confirmed by the U.S. Senate. Ibid.

[196]Ibid., p. 19 (stating that: "[a]s with other Federal civil rights enforcement agencies, the Office for Civil Rights has experienced severe budgetary reductions since 1981"). In 1981 OCR had a budget of $46.9 million. Since then, this agency's budget has declined steadily. By FY 1988 OCR's budget was $40.5 million. In constant 1981 dollars, OCR's budget has fallen from $46.9 million in 1981 to $30.9 million in 1988. In constant dollars, OCR has therefore lost approximately 35 percent of its budget since 1981. Ibid.

[197]*See* U.S. Commission on Civil Rights, *Title VI Enforcement*, chap. 5; U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement* (June 1995), "Office for Civil Rights, Department of Education"; U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990's* (Washington, DC: U.S. Government Printing Office, February 1992), chap. 4. "Access to Educational Opportunity: Asian American Immigrant"; U.S. General Accounting Office, *Within-School Discrimination: Inadequate Title VI Enforcement by the Office for Civil Rights* (July 1991); 1988 House Report on OCR; U.S Congress, Committee on Government Operations, *Failure and Fraud in Civil Rights Enforcement by the Department of Education*, 100th Cong., 1st sess., House Rpt. 100-334, Oct. 2, 1987 (hereafter cited as 1987 House Report on OCR); U.S Congress, Committee on Government Operations, *Investigation*

At the time of the U.S. Department of Education's creation in 1980, OCR remained under a 1977 court order issued by the U.S. District Court for the District of Columbia in the case of *Adams v. Califano*.[198] The longstanding *Adams* litigation began in 1970 when the NAACP Legal Defense and Educational Fund filed a class action suit against the U.S. Department of Health, Education, and Welfare's Office for Civil Rights. The *Adams* plaintiffs, mainly students attending public schools and their parents, alleged that OCR had failed to enforce Title VI in 17 Southern and Border States. The plaintiffs argued that OCR refused to initiate enforcement proceedings against a number of State systems of higher education, State-operated vocational and special-purpose schools, and local school districts found in actual or presumptive violation of Title VI.[199] In February 1973, the district court issued an order granting the *Adams* plaintiffs declaratory and injunctive relief affirmed by the U.S. Court of Appeals for the District of Columbia.[200]

At this time, more litigation against OCR developed as a result of complaints about OCR's implementation and enforcement of Title IX of the Education Amendments of 1972 and section 504 of the Rehabilitation Act of 1973. Although the Rehabilitation Act had been enacted and signed into law in 1973, and in 1974 Congress expressed expectations that Federal agencies would promulgate regulations and develop enforcement systems for implementing section 504, the then U.S. Department of Health, Education, and Welfare (HEW) had yet to issue section 504 regulations.[201] On June 3, 1975, James L. Cherry and the Action League for Physically Handicapped Adults petitioned HEW to issue section 504 regulations. When HEW refused to take such action, Cherry filed a lawsuit in the U.S. District Court for the District of Columbia on February 13, 1976.[202] Although HEW issued a Notice of Intent to Issue Proposed Rules for section 504 on May 17, 1976, the court ordered HEW to ensure that "no further unreasonable delays affect the promulgation of regulations under Section 504,"[203] on July 19, 1976, 3 days after HEW had published a Notice of Proposed Rulemaking.[204] By March 1977, the section 504 regulations still had not been finalized, and HEW announced that it would have full departmental review of the draft regulation. Persons with disabilities viewed this action as a further delay, prompting groups of individuals with disabilities to stage a protest for 28 hours at HEW's headquarters offices in Washington, DC, and for 22 days at HEW's San Francisco regional offices. On April 28, 1977, HEW finalized the section 504 regulations.[205]

Beyond the controversy surrounding the section 504 regulations, litigation in the *Adams* case continued. In 1974 the Women's Equity Action League filed a suit[206] against HEW, in which it alleged that HEW and the U.S. Department of Labor were failing to enforce Title IX and Executive Order 11,246.[207] In 1976 the plaintiffs in this litigation and a group of Mexican American public school students intervened in the *Adams* case.[208]

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of Civil Rights Enforcement by the Office for Civil Rights at the Department of Education, 99th Cong., 1st sess., House Rpt. 99-458, Dec. 30, 1985 (hereafter cited as 1985 House Report on OCR).

[198]Adams v. Califano, 430 F. Supp. 118, 121 (D.D.C. 1977).

[199]1988 House Report on OCR, p. 14. The plaintiffs specifically alleged that, in 1969 and 1970, the U.S. Department of Health, Education, and Welfare (HEW), Office for Civil Rights, had found unlawful segregation in the State systems of higher education in Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania, and Virginia, but had failed to obtain either voluntary compliance through negotiations or to commence enforcement proceedings. On the elementary and secondary school levels, plaintiffs alleged, among other things, that the Office for Civil Rights had initiated administrative enforcement proceedings against only 7 out of 74 school districts it had found in noncompliance with Title VI. HEW argued that it had not instituted such proceedings because it was continuing to seek voluntary compliance with Title VI through negotiation and conciliation. Ibid., p. 15 (citing Adams v. Richardson, 351 F. Supp. 636, 638 (D.D.C. 1973)). In a 1972 Memorandum Opinion, the district court held that, where a *substantial* [emphasis added] period of time had elapsed without achieving voluntary compliance, Office for Civil Rights's discretion to conduct limited enforcement was ended and it had to take action to terminate funds in accordance with its regulations or by any other means authorized by law, including referrals to the U.S. Department of Justice. 1988 House Report on OCR, p. 15 (citing 351 F. Supp. at 641).

[200]1988 House Report on OCR, p. 15 (citing Adams v. Richardson, 480 F.2d 1159 (D.D.C. 1973)).

[201]U.S. Department of Education, *OCR Handbook for the Implementation of Section 504 of the Rehabilitation Act of 1973* (April 1981), p. 16 (hereafter cited as *OCR Sec. 504 Handbook*).

[202]*See* Cherry v. Mathews, 419 F. Supp. 922 (D.D.C. 1976).

[203]419 F. Supp. 922, 924 (D.D.C. 1976).

[204]*OCR Sec. 504 Handbook*, p. 17 (citing 41 Fed. Reg. 20,296 (1976); 41 Fed. Reg. 29,548 (1976)).

[205]*OCR Sec. 504 Handbook*, pp. 18-19.

[206]1988 House Report on OCR, p. 15.

[207]<$Ibid. (noting that "Executive Order 11,246 is a presidential directive barring Federal contractors from discriminating on the basis of race, religion, sex, color, or national origin, and requiring affirmative action where there is an underutilization of members of one or more of these protected groups" and citing 30 Fed. Reg. 12,319, *as amended by* Exec. Order 11,375 (1967) and 12,068 (1978)).

[208]1988 House Report on OCR, p. 16 (citing Adams v. Matthews, 356 F.2d 417, 418 (D.D.C. Cir. 1976)). The Women's Equity

In the following year, the National Federation of the Blind, arguing lack of enforcement of section 504, also intervened in the *Adams* litigation. The parties entered into a consent decree broadening a 1977 court order in *Adams* to cover HEW's civil rights enforcement in all 50 States, and extending its subject matter to complaints and compliance reviews under section 504, Title IX, and Executive Order 11,246, as well as Title VI.[209]

In a series of court orders issued in the *Adams* case between 1973 and 1977, the court sought to guide OCR's implementation, compliance, and enforcement activities toward the implementation of more stringent enforcement procedures. The court's oversight during these years required, among other things, that OCR, within a certain specified time period, begin enforcement proceedings against various school districts and State systems of higher education found in actual or presumptive violation of Title VI. The court also required OCR to implement enforcement programs to secure Title VI compliance, monitor school districts under desegregation orders to ensure that they remained in compliance with the orders, publish annual operating plans, survey school districts to determine where compliance reviews should be conducted,[210] report to the court and the plaintiffs on enforcement activities, and expand its resources to facilitate compliance with the court's orders.[211]

Despite the court's measures, by 1981, there remained some 170 backlogged complaints on OCR's docket.[212] Some of these complaints dated back to 1972.[213] The *Adams* plaintiffs filed additional motions in 1981 and 1982 for failure to comply with the 1977 court order's specified time frames for processing complaints and compliance reviews.[214] The court responded with an order in 1983 that expanded OCR's recordkeeping requirements and required it to begin enforcement proceedings on pending cases in which violations of law had been found.[215] The 1983 order mandated the strongest measures yet to ensure that OCR begin enforcement proceedings against educational institutions in noncompliance with Title VI.[216] Five years later, a report of the U.S. House of Representatives, Committee on Education and Labor, noted that:

> Over the ten years preceding the *Adams* court's 1983 order, the court's requirements became more and more comprehensive, leading the civil rights agencies to complain that the court was encroaching upon their Executive branch enforcement authority. On the other hand, it has been argued that *Adams* was singularly effective in promoting enforcement of the civil rights statutes within OCR's jurisdiction.[217]

OCR remained under the court orders imposed by the *Adams* litigation through most of the 1980s.[218] On June 26, 1990, the U.S. Court of Appeals for the District of Columbia denied the plaintiff's claim of a private right of action against DOEd under civil rights statutes and the Administrative Procedure Act, thus ending the

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Action League plaintiffs intervened only on the issue of resource allegation. Their remaining allegations continued to be addressed separately from the *Adams* litigation. Ibid.

[209]1988 House Report on OCR, p. 16.

[210]Ibid. (citing Adams v. Matthews, Civ. Action No. 3095-70 (D.D.C., June 14, 1976)).

[211]Ibid.

[212]Ibid.

[213]Ibid.

[214]1988 House Report on OCR, pp. 16-17.

[215]1988 House Report on OCR, pp. 16–17 (citing Adams v. Bell, Civ. Action No. 3095-70, (D.D.C., March 11, 1983; WEAL v. Bell, Civ. Action No. 74-1720).

[216]The *Adams* order of March 11, 1983, required OCR to meet the following deadlines on compliance reviews: 1) within 90 days of the date a review commences, OCR must determine if the affected institution is in compliance with applicable laws regarding the issue investigated; and if corrective action is not achieved within 180 days of the commencement of a review resulting in negative findings, then OCR must initiate enforcement proceedings within 210 days of commencement.
The order required OCR to meet the following deadlines on complaint investigations: 1) OCR must acknowledge a complaint within 15 calendar days, and inform the complainant whether the complaint is complete or incomplete; 2) if the complaint is complete, OCR must notify the complainant within 15 days of the receipt of the complaint whether it had jurisdiction over the allegations, and whether an onsite investigation will be conducted; 3) if the complaint is incomplete, OCR must notify the complainant within 15 days of the key elements missing in the allegations. If the information required to complete the complaint is not provided within 60 days, OCR may close the complaint.; 4) within 15 days of the receipt of a complete complaint, OCR must notify the affected institution of the nature of the complaint, and procedures and laws to be followed in investigating the complaint, including whether an onsite visit is planned; 5) findings must be issued within 105 days of the receipt of a complaint; and 6) in cases where a violation of law is found, OCR must bring the affected institution into compliance within 195 days of the receipt of the complaint and, if corrective action is not secured by that time, OCR must initiate enforcement proceedings within 225 days after the receipt of the complete complaint. 1985 House Report on OCR, pp. 3–4.

[217]1985 House Report on OCR, p. 17.

[218]During this time, witnesses came before Congress in 1985 and 1987 to assail OCR for its continued failure to comply with the *Adams* court's 1983 order. *See* 1985 House Report on OCR, pp. 7-8 (noting in addition that: "[m]ore seriously, OCR was discovered to have engaged in actions to thwart the effect of the order and its mandated time frames for case processing by 'backdating' civil rights documents"). *See also* 1987 House Report on OCR.

litigation's 20 years history and removing all court-imposed obligations from OCR.[219]

In addition to the comprehensive judicial oversight resulting from the *Adams* litigation, political controversy helped to shape OCR's Title VI implementation, compliance, and enforcement activities. For example, shortly after the creation of the Department of Education in 1980, OCR attempted to issue regulations requiring school districts to follow specific guidelines for Title VI compliance in the development and implementation of education programs for students with limited or no English proficiency. OCR had released informal guidelines developed and disseminated to school districts 5 years earlier.[220] In 1978 a school district in Alaska challenged the legality of using informal guidelines to determine Title VI compliance.[221] As part of a consent decree, OCR agreed to publish formal guidelines at the earliest practical date. In August 1980, in compliance with the consent decree, OCR published in the *Federal Register* a Notice of Proposed Rulemaking.[222]

The Notice of Proposed Rulemakng unleashed a firestorm of political controversy in which opponents of the proposed guidelines criticized them as too prescriptive and intrusive on the prerogatives of States and local school districts to develop and implement their own education programs.[223] As a result, on February 2, 1981, the Department officially withdrew the proposed regulations.[224] OCR has not attempted to issue new regulations on Title VI compliance under *Lau* since that time. Instead, it has relied for policy guidance on the formal Title VI regulations promulgated in 1970 and two more recent policy memoranda, one issued to OCR staff in December 1985 and an update issued in September 1991. Like the 1975 "*Lau* remedies," neither the 1985 nor the 1991 memorandum have been released as formal guidance. However, they remain the Office for Civil Rights' stated policy on Title VI and *Lau* compliance.

Despite the small amount of new policy guidance issued on Title VI compliance and enforcement during the 1980s, OCR developed a strong record during this period on section 504 policy. OCR produced numerous internal section 504 policy memoranda and policy guidance. It also issued an extensive number of section 504 policy letters providing technical assistance and policy clarification to individuals and organization. During this period, OCR's section 504 policymaking and policy guidance efforts reflected an active response to developing judicial caselaw and to contemporary issues arising in schools.[225]

During the mid-1980s, the U.S. Supreme Court significantly narrowed the coverage of Title VI, Title IX, and section 504 coverage. In its 1984 decision in *Grove City College v. Bell*,[226] the Court adopted program-specific coverage for Title IX, and by implication Title VI and section 504, instead of

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[219]Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990).

[220]HEW's Office for Civil Rights issued informal guidelines on the development and implementation of education programs for students with limited English proficiency in 1975, 1 year after the U.S. Supreme Court's decision in *Lau v. Nichols*. These guidelines therefore came to be known as the "*Lau* guidelines" or "*Lau* remedies." Since the *Lau* court did not mandate any specific kind of special instruction programs schools would be required to provide to students with limited English proficiency, with the "*Lau* remedies," the Office for Civil Rights sought to help school districts understand their legal responsibilities under Title VI as interpreted in the *Lau* decision. The Office for Civil Rights issued the "*Lau* remedies" in August 1975 and circulated them widely among school districts. Although never formally published in the *Federal Register* nor formally promulgated as formal regulations, they quickly became the de facto standards that the Office for Civil Rights applied to assess school districts Title VI compliance under *Lau*. U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, p. 83.

[221]U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, p. 83 (citing Northwest Arctic Sch. Dist. v. Califano, Civ. Action No. A-77-216 (D. Alaska, Sept. 29, 1978. *See also* James J. Lyons, *Legal Responsibilities of Education Agencies Serving National Origin Language Minority Students* (Washington, D.C.: Mid-Atlantic Equity Center, American University, 1988) (citing same case).

[222]U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, p. 83 (citing 45 Fed. Reg. 52,052 (1980)).

[223]U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, p. 83 (citing Lyons, *Legal Responsibilities*, p. 19).

[224]Ibid.

[225]*See* discussion below on OCR's section 504 policies at text accompanying nn. 502–534.

[226]465 U.S. 555 (1984). The Supreme Court's decision in *Grove City* addressed the coverage and applicability of Title IX's prohibition on sex discrimination in programs receiving Federal financial assistance. In finding that Title IX coverage was limited to the specific program receiving Federal assistance, the Court built upon its earlier decision in *North Haven Board of Education v. Bell*, 456 U.S. 512, 538 (1982). To facilitate its analysis in *Grove City*, the Court focused on the "purpose and effect" of the Federal financial assistance. 465 U.S. at 573. Because the student grants increase the funds available for financial aid, the Federal financial assistance enables the college to enroll students who otherwise would not be able to afford higher education. Thus, Title IX applied only to the college's financial aid program that was subsidized, in effect, by Federal education grants distributed directly to students. 465 U.S. at 573-74.

institutionwide applicability. To ensure the broad, institutionwide application of Title VI and other civil rights statutes, Congress passed the Civil Rights Restoration Act of 1987.[227] In the Restoration Act, Congress sought to reaffirm legislatively the broader application of the statute that existed before *Grove City*.[228] Congress restored the implementation and compliance authority of the agencies. As a result, the agencies gained the power to apply institutionwide their rules, regulations, and orders prohibiting discrimination pursuant to the nondiscrimination policy of Title VI.[229]

From the time of the act's passage in 1987 until FY 1994, the number of complaints received by OCR increased by 168 percent.[230] In addition to an increase in the number of complaints, OCR also experienced an increase in complex, multi-issue complaints, involving issues related to limited-English-proficient students and AIDS.[231] During this period of expanding workloads, however, staffing for OCR increased by only 2 percent.[232] This dramatic increase in complaint workload, without a commensurate rise in staffing, had a severe negative effect on OCR's ability to conduct compliance reviews.[233] For example, the number of compliance reviews initiated by OCR dropped from 245 in FY 1988 to 32 in FY 1990.[234] By 1995 the number had increased again to 200.

In the late 1980s and early 1990s, OCR's enforcement activities, particularly its enforcement with respect to Title VI issues, became the subject of steady and mounting criticism in numerous reports.[235] For example, OCR responded to a congressional request to compile data on its Title VI/*Lau* compliance review activities.[236] These data revealed that during the period from 1981 through 1985, it was nine times less likely for OCR to conduct a compliance review in a given school district than in the preceding 4-year period, 1976-1980.[237] This report also included among its findings the following statistics: OCR conducted only 95 compliance reviews covering 65 school districts during the 1981-1985 period, compared with 573 districts reviewed between 1976 and 1980; when violators agreed to take corrective action, OCR officials rarely made site visits to see whether corrective action had been taken as agreed; of 78 plans negotiated or renegotiated since 1981, only 6 had been the targets of subsequent monitoring; and from 1981-1983, 44 school districts failed compliance reviews and agreed to make changes, yet OCR returned to only 2 of these for later review or monitoring.[238] Another report, a 1988 Citizen's Commission on Civil Rights analysis of OCR's enforcement activities, concluded that: [w]ith respect to ensuring equal educational opportunity for limited-English-proficient students. . ., OCR [has] failed to fulfill [its] responsibilities over the last eight years."[239]

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[227]Pub. L. No. 100-259, 102 Stat. 28 (codified as amended at 20 U.S.C. §§ 1681note, 1687, 1687note, 1688, 1688note (1988); 29 U.S.C. §§ 706, 794 (1988 & Supp. V 1993); 42 U.S.C. §§ 2000d-4a, 6107 (1988)).

[228]*See* Pub. L. No. 100-259, § 2, 102 Stat. 28 (codified at 20 U.S.C. § 1687 (1988)). *See also* U.S. Congress, Senate, Committee on Labor and Human Resources, *Civil Rights Restoration Act of 1987*, 100th Cong., 2d sess., S. Re. No. 64, p. 2, *reprinted in* 1988 U.S.C.C.A.N. 3, 4. Although the congressional minority fought the passage of the Civil Rights Restoration Act of 1987, they agreed that the Court's decision in *Grove City* should be reversed legislatively. The Senate Judiciary Committee minority stated, "There is no disagreement within the Committee that we should not permit or subsidize discrimination against minorities, women, persons with handicaps or the aged. Nor does the controversy arise over whether the decision of the Supreme Court in *Grove City College v. Bell* should be reversed. We agree on that point as well." U.S. Congress, Senate, Committee on Labor and Human Resources, *Civil Rights Restoration Act of 1987*, 100th Cong., 2d sess., S. Re. No. 64, p. 37, *reprinted in* 1988 U.S.C.C.A.N. 3, 35.

[229]Pub. L. No. 88-352, § 601, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (1988)).

[230]Pub. L. No. 88-352, § 601, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (1988)).

[231]U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement*, p. 11.

[232]Ibid.

[233]Ibid.

[234]Ibid.

[235]*See generally*, U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*; U.S. General Accounting Office, *Within-School Discrimination: Inadequate Title VI Enforcement by the Office for Civil Rights* (July 1991) (hereafter cited as GAO, *Within-School Discrimination*); Citizens' Commission on Civil Rights, *One Nation Indivisible: The Civil Rights Challenges of the 1990s* (1988); 1988 House Report on OCR, p. 5; 1985 House Report on OCR.

[236]U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, p. 84.

[237]Ibid. (citing James Crawford, "U.S. Enforcement of Bilingual Plans Declines Sharply," *Education Week*, vol. V, no. 37 (June 4, 1986), p. 1) (reporting on statistics compiled for the U.S. House of Representatives, Committee on Education and Labor, Judiciary Subcommittee on Civil and Constitutional Rights)).

[238]U.S. Commission on Civil Rights, *Civil Rights Issues Facing Americans in 1990s*, p. 84 (citing Crawford, "U.S. Enforcement of Bilingual Plans Declines Sharply," pp. 1, 14-15).

[239]U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian-Americans in the 1990s*, p. 84 (citing Citizens' Commission on Civil Rights, *One Nation Indivisible: The Civil Rights Challenges of the 1990s* (1988)).

Some of these reports criticized OCR's overall civil rights enforcement, especially its Title VI enforcement. A 1985 congressional report noted that OCR "rarely used" enforcement methods such as issuing a notice of opportunity for hearing or referring the case to the Department of Justice.[240] This report stated that from 1981 to July 1985, OCR found 2,000 violations of law, but issued only 27 notices of opportunity for hearing and referred just 24 additional cases to DOJ.[241] The report illustrated the effects of OCR's failure to initiate enforcement proceedings with the following example:

> OCR's reluctance to initiate enforcement proceedings, in current as well as past administrations, is poignantly illustrated by the case of the Dillon County School District Number Two in South Carolina. The district had previously operated under *de jure*, or legally required, segregated school systems. On three separate occasions—May 1977, October 1979, and February 1982—OCR conducted on-site investigations of the school district, and found it in violation of Title VI as a consequence of ability grouping practices. . . . Despite some voluntary attempts to correct the problem, the Title VI violations continued in Dillon County, yet OCR did not bring enforcement action against the district. . . . On June 23, 1983, five years after the initial compliance review found violations of Title VI, OCR referred the Dillon case to DOJ. . . . In May 1983, DOJ informed OCR that it had declined the Dillon case. At the time of the subcommittee's second hearing, on September 11, 1985, OCR still had taken no action against Dillon, even though 15 months had passed since the case was declined by DOJ. Following persistent questioning by the subcommittee about the Dillon matter, Harry M. Singleton, then-Assistant Secretary for Civil Rights at DOEd, testified that OCR would commence enforcement proceedings against Dillon immediately. Eight years after the initial violation of law was found, OCR had finally begun enforcement proceedings, but only after prodding from the *Adams* court and subcommittee. The committee believes the delay, in light of the fact that discrimination had continued in the school district during the entire eight years, is not in accord with the intent of the civil rights laws passed by Congress.[242]

In addition, this report found that "despite insufficient resources, OCR had not used all funds appropriated by Congress for the enforcement of Federal civil rights laws."[243] It noted that:

> [b]ased on the subcommittee's analysis of the OCR budget, and information supplied by the DOEd budget office, the committee finds that more than $20 million appropriated by Congress for civil rights enforcement between fiscal years 1980 and 1985 was returned to the Treasury or spent on activities unrelated to the OCR operation. . . . The committee believes that OCR's refusal to use all funds appropriated for it by Congress has prevented OCR from pursuing more active enforcement. In fact, in most cases where enforcement was pursued by OCR, it was only after the *Adams* Court imposed enforcement deadlines for old cases. If OCR has sufficient resources, it not only could meet the *Adams* deadlines, it could bring more independent enforcement actions against recipients who violate the civil rights laws.[244]

A 1988 congressional report leveled the most scathing charges of all. This report concluded that OCR "has adamantly failed to enforce the civil rights laws according to its mandate" and that "the history of OCR is a history of lethargy, defiance, and unwillingness to enforce the law."[245] This report found that: 1) OCR "has not vigorously enforced laws protecting the rights of women and minorities in education since 1981";[246] 2) "[t]here was a clear perception among [OCR] regional office staff that certain issues were 'off limits' and could not be investigated. Most of the issues involved race discrimination. Among such issues were: discrimination involving disciplinary actions and the placement of black students in special education programs";[247] and 3) "[t]he National Office made it virtually impossible to find a violation of the civil rights laws because the standard of proof required to establish a violation was a stringent 'intent' standard, which many regional staff believed was not required by the courts."[248]

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[240]1985 House Report on OCR, p. 3. The subcommittee conducted the hearing to examine OCR's investigative activity in light of mandated timeframes and procedures established by the U.S. District Court for the District of Columbia in the *Adams* order. Ibid.

[241]1985 House Report on OCR p. 3.

[242]1985 House Report on OCR, pp. 7-8.

[243]Ibid. p. 30.

[244]Ibid., pp. 30-31.

[245]1988 House Report on OCR, pp. 20-21.

[246]Ibid., p. 2 (noting that of the 9,768 complaint investigations initiated by OCR during the period from FY 1981-1988, only 3 percent were related to discrimination on the basis of national origin, 15 percent to race discrimination, and 17 percent to gender discrimination, and of the 1,378 compliance reviews initiated, only 46 percent were related to national origin discrimination issues and 162 to race discrimination).

[247]Ibid., p. 4.

[248]Ibid., p. 5. At a 1989 House Committee on Education and Labor oversight hearing, then-Acting Assistant Secretary William L. Smith addressed the report's findings relating to "off limits" issues and OCR's application of an intent standard. Mr. Smith stated in regard to "off limits issues" that "except for those issues over which OCR has no jurisdiction, no issues are 'off limits' to OCR. All issues that arise through the complaint process are treated equally, and investigations are carried out as necessary to resolve issues raised by the complaint allegations." William L. Smith, Acting Assistant Secretary for Civil Rights, U.S. Department of Education, "Office for Civil Rights Response to the Committee on Education and Labor Staff Report Entitled

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As the 1990s began, OCR, now freed from the judicial oversight of the *Adams* years, sought to respond to the findings in these reports in two ways: 1) by defending its record on the grounds that it had never been adequately funded by Congress and requesting more funding to implement effectively civil rights compliance and enforcement; and 2) by initiating new, more proactive policies, especially in the area of strategic planning and compliance reviews. Assistant Secretary Michael L. Williams in his remarks accompanying OCR's FY 1991 "Annual Report" reminded Congress that it had "failed to fully fund the President's budget requests for OCR in three of the past four fiscal years. As a result, critical program activities, such as compliance reviews and technical assistance, had to be drastically curtailed."[249] Mr. Williams sought and received more funding for OCR. Funding requests and appropriations for OCR increased substantially from FY 1989 to FY 1993.[250]

Mr. Williams announced OCR's first "National Enforcement Strategy" in December 1990.[251] The first National Enforcement Strategy sought to "guide OCR's compliance efforts. . .and enable OCR to focus on high-priority educational equity issues."[252] It also gave "new emphasis" to such activities as "monitoring remedial action agreements, including onsite visits where appropriate, to ensure agreements are being fully implemented."[253] In addition, it established procedures to ensure "thorough and timely monitoring activities" and gave monitoring activities the same priorities as complaint investigations."[254]

In 1991 Mr. Williams announced that OCR's National Enforcement Strategy for FY 1991 and FY 1992 would focus on "specific high priority issues."[255] The report named the following civil rights issues as "high priority" in 1991: 1) equal educational opportunities for national origin minority and Native American students who are limited English proficient; 2) ability grouping that results in segregation on the basis of race and national origin; 3)racial harassment in educational institutions; 4) responsibilities of school systems to provide equal educational opportunities to pregnant students; 5) appropriate identification for special education and related services for certain student populations, e.g., drug-exposed and homeless children with handicaps; 6) discrimination on the basis of sex in athletic programs; and 7) attention deficit disorder.[256] The report states that OCR chose these issues "based on experience and knowledge of recurring compliance problems and because of their potential for broad impact on large numbers of students."[257]

Despite these new and promising initiatives, a 1991 GAO report found that OCR's Title VI enforcement activities remained largely ineffective in implementing its mandate to address discriminatory practices in the schools.[258] The GAO report concluded:

> OCR's title VI enforcement activities relating to within-school discrimination have been inadequate. For example, OCR has not met the regulatory requirement for undertaking compliance reviews when it has information of possible noncompliance. Additionally, in their ability-grouping and tracking investigations, OCR regional offices have been inconsistent in determining if student assignment practices are discriminatory. As a result, some ability-grouping and tracking investigations GAO reviewed permitted the same practices that others found in violation. A lack of internal OCR policy guidance contributed to such inconsistency. Finally, OCR has insufficiently monitored school districts' corrective actions; as a result, OCR has sometimes failed to determine if discriminatory practices it identified have been stopped.[259]

OCR itself prefaced a 1992 report to Congress with a message that indicts the civil rights activities undertaken

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Investigation of the Civil Rights Enforcement Activities of the Office for Civil Rights, U.S. Department of Education," p. 311 in U.S. House of Representatives, Committee on Education and Labor, *Hearing on the Federal Enforcement of Equal Educational Opportunity Laws*, H.R. Serial No. 101-73, 101st Cong., 1st Sess. (1990) (hereafter cited as OCR Response to the Committee on Education and Labor Staff Report). In addressing the report's findings related to the use of an intent standard, Smith stated that "the regulations do not require proof of an intent to discriminate to find a violation of Title VI. . . The regional offices have never been told that a violation of Title VI will be found only if the regional offices can obtain evidence of intent to discriminate. All evidence gathered in an investigation, including any evidence of an intent to discriminate, is evaluated under the pertinent regulations to determine whether the recipients are in compliance." OCR Response to the Committee on Education and Labor Staff, p. 311.

[249]U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress Fiscal Year 1991*, Foreword, p. iii. *See also*, U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement*.

[250]U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement*.

[251]U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress, Fiscal Year 1990*, p. v.

[252]Ibid., p. 3.

[253]Ibid., p. 8.

[254]Ibid.

[255]U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress. Fiscal Year 1991*, p. 17.

[256]Ibid., pp. 18-30.

[257]Ibid., p. 17.

[258]GAO, *Within-School Discrimination*.

[259]Ibid., p. 4.

by OCR in 1990–1992 as "a passive approach to civil rights enforcement, an approach that places the heavy burden of finding and eliminating civil rights violations on individual students and parents. Little or no policy guidance was provided. Only in a very few instances did OCR initiate its own investigations into areas of likely discrimination. On the whole, underserved populations, such as racial minority students and limited English proficient students, were neglected by OCR."[260]

Since 1993 OCR has pursued a new, more proactive agenda through strategic enforcement plans based on the one introduced by OCR in 1990. Recognizing that the complaint workload still overshadowed OCR's ability to conduct proactive activities,[261] particularly compliance reviews, in 1993 OCR announced a strategic plan that would shift 40 percent of its resources from complaint investigations to more proactive and effective enforcement mechanisms such as compliance reviews, policy development, and technical assistance.[262] In addition, the strategic plans issued by OCR since 1990 have changed the focus in OCR's compliance review program "from an emphasis on overall numbers to an emphasis on impact."[263]

In 1993 OCR stated to Congress that it planned to "renew its compliance review program" by "working wherever possible in partnership with state and local educational institutions. . .to address civil rights problems early and proactively."[264] The report noted also that because "hardly a year has gone by without a public report critical of OCR's operations. . . Carrying out its civil rights responsibilities will require OCR to address fundamentally its methods of doing business."[265] The report states that OCR will seek to achieve its goals by applying to its management initiatives "principles of staff empowerment, delayering and customer orientation."[266]

In 1994 OCR informed Congress that its focus on "new ways of doing business" had already demonstrated promise.[267] Assistant Secretary Norma V. Cantú wrote that "[i]n an era of decreasing staff resources and increasing case loads, OCR is developing new approaches to the resolution of complaints of discrimination. OCR's leadership and innovation are avoiding case backlogging, preserving OCR's ability to assist both recipients and complainants through technical assistance, and combining OCR's enforcement obligations with cooperative approaches to the development of strong, educationally sound remedies to serious civil rights problems."[268] In addition, OCR informed Congress that in FY 1994, it had "accomplished major changes through its new approach. . . . For example, the average number or days for complaint resolution under the old bureaucratic structure was 169 days. The new teams reduced the average number of days to resolve a complaint to 129, a 24 percent improvement."[269]

OCR's Goals and Plans

Strategic Enforcement Planning

In 1990, for the first time in its history, OCR developed a National Enforcement Strategy to promote equal educational opportunity for all students.[270] OCR designed the National Enforcement Strategy to enable OCR, which was devoting increasing resources to complaint investigations, to maximize usefulness of its remaining resources by creating "a comprehensive and well-coordinated program of policy development, staff training, compliance reviews, technical assistance, and policy dissemination."[271]

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[260]U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress: Fiscal Year 1992*, p. ii.

[261]*See*, U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress: Fiscal Year 1993*, p. 10 (Stating that: [i]n 1993, nearly 90 percent of OCR resources were spent in a complaint mode. This approach did not adequately address the variety of civil rights problems faced by vulnerable groups in the U.S. unable or afraid to complain. For example, LEP students were largely unserved by the complaint process. . . . In 1994, OCR will revisit fundamentally its approach to complaint processing. Our goal is to provide more timely and more effective intervention at the beginning of the complaint process. OCR anticipates that students, parents and educators will become more central to the resolution of their own complaints.).

[262]U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement*, p. 13, citing U.S. Department of Education, Office for Civil Rights, Fiscal Year 1995 Budget Request, p. 11.

[263]U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement*, pp. 11-12, citing U.S. Congress, Senate, Committee on Labor and Human Resources, *Oversight Hearing Office for Civil Rights, Department of Education*, 102nd Cong., 1st sess., 1991, p. 15.

[264]U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress: Fiscal Year 1993*, pp. 10-11.

[265]Ibid., p. 11.

[266]Ibid.

[267]*See*, U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress: Fiscal Year 1994*, p. 13 (Stating that "OCR is redeploying staff to improve productivity. OCR is delivering a stronger civil rights enforcement program, focusing energy on internal and external customer service, reducing formal layers of review, and moving the maximum number of staff to program activities.").

[268]Ibid., p. ii.

[269]Ibid., p. 13.

[270]U.S. Department of Education, Office for Civil Rights, *National Enforcement Strategy: FYs 1991-1992*, Dec. 11, 1990.

[271]Ibid., pp. 1-2. *See also*, U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress: Fiscal Year 1990*,

High-priority issues for FY 1991 and FY 1992 were selected based on a concern that the practices of some educational institutions inhibited the provision of equal educational opportunities in violation of the civil rights statutes.[272] Some of these issues were:

- Equal educational opportunities for national origin minority and Native American students who are limited English proficient;[273]
- Ability grouping that results in segregation on the basis of race and national origin;[274]
- Racial harrasment in educational institutions,
- Overinclusion of minority students in special education classes;
- Appropriate identification for special education and related services for certain student populations, e.g., "crack babies" and homeless children with disabilities;

Michael L. Williams, Assistant Secretary for Civil Rights, Foreword, p. v. (Stating that "[m]y own review of the compliance program, undertaken shortly after my confirmation as the Assistant Secretary for Civil rights, suggested the need to address high-priority educational equity issues in these areas. This will enable OCR to establish a more comprehensive and balanced enforcement program and focus its available resources on those important issues that can be more effectively addressed through OCR's compliance review and technical assistance activities. . . . To this end, I announced, on December 11, 1990, OCR's National Enforcement Strategy. The strategy will guide OCR's compliance efforts for the next two years and enable OCR to focus on high-priority educational equity issues. The issues, which are identified in the report,also are relevant to the attainment of national goals aimed at improving access to quality education. I want to emphasize that in implementing the strategy, OCR will not abandon its responsibility to individual complainants. We must, however, ensure that our efforts to eliminate discrimination are used to the very best advantage. . . . There is a compelling national interest in eliminating discrimination in our educational institutions. If present trends continue, 68 percent of workers entering the labor force between now and the year 2000 will be minorities and women. It is vital to our security and quality of life that from this diverse population our educational system has a steady stream of students who are ready, willing, and capable of learning. And it is vital to our ability to compete in the world economy that all students, minority and nonminority alike, are prepared for the new high technology and managerial jobs American business will create in the coming years.")

[272]Ibid., p. 2.

[273]*See* U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress: Fiscal Year 1991*, pp. 18-19 (reporting that: "On September 27, 1991, OCR issued a policy update on the application of Title VI to the provision of services for LEP students for used by the OCR regional offices in conducting investigations on this issue. . . . OCR initiated compliance reviews of 12 school districts in FY 1991 to ensure that they were providing special language services to meet the needs of LEP students. This is the largest number of compliance reviews OCR has initiated on this issue. . . . During FY 1991, OCR worked on developing a technical assistance resource package and a pamphlet on providing services to LEP students. OCR also conducted a number of technical assistance and outreach activities during FY 1991 on the issue of equal educational opportunities."); U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress: Fiscal Year 1992*, pp. 18-19 (reporting that: "OCR initiated reviews of 16 school districts in FY 1992 to ensure that language minority students are provided an equal educational opportunity as required by Title VI. In six of the nine reviews that were closed, OCR found school policies and practices that prevented the effective participation of language minority students. . . . Extensive technical assistance outreach activities were carried out to ensure widespread dissemination and understanding of a policy update [September 1991 memorandum] OCR issued that provides additional guidance to regional offices in conducting investigations. The update was mailed to the Chief State School Officers and to more than 2,000 organizations. A team of regional and headquarters experts developed training materials on the application of the policy and investigative techniques; and, from March through August 1992, the team provided training in each of the ten regional offices and in headquarters.").

[274]*See* U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress: Fiscal Year 1991*, pp. 19-20 (reporting that: "During FY 1991, OCR developed a draft policy under Title VI on ability grouping practices that result in segregation on the basis of race. We also initiated seven ability grouping compliance reviews. During FY 1991, OCR continued to investigate complaints alleging that school districts were using discriminatory ability grouping practices. For example, OCR completed its investigation of a complaint alleging that the Flossmoor School District (illinois) had an ability grouping system that discriminated against black students at a junior high school by disproportionately placing them in lower ability grouped levels and by generally failing to allow them admission to higher ability grouped levels designed for high school credit. . . . As a result of OCR's findings, Flossmoor immediately eliminated ability grouping of science courses for all grades and agreed that, effective the first semester of the 1992–1993 school year, it will implement a revised system for assigning students to English, reading, and mathematics courses on the basis of achievement or ability. The district's revised system will include clearly stated educational goals with measures reasonably designed to meet the goals, and the district will provide clear guidance to staff regarding the application of placement criteria."); ibid. (reporting that: "[b]ecause of the adverse effect discriminatory grouping practices can have on the educational experience of students, OCR initiated nine compliance reviews on this issue. OCR sought to determine whether any racially identifiable classrooms resulting from ability grouping practices were educationally justified and not a pretext for discrimination. Only two Letters of Findings (no violations) were issued. However, a number of investigative reports were drafted and were being reviewed at the end of the fiscal year. . . . OCR also conducted technical assistance outreach on this issue. A workshop was presented at the Office of Elementary and Secondary Education's Title IV Magnet Conference.").

- Student transfer and school assignment practices that result in the illegal resegregation of minority students; and
- Equal opportunity for minorities and women to participate in math and science courses.[275]

Some of the activities planned to implement OCR's enforcement strategy included:

- Development of a definitive policy statement regarding the responsibilities of recipients under Title VI of the Civil Rights Act of 1964;
- Development of guidelines for regional staff to follow in investigating complaints or conducting compliance reviews, including model investigative plans; and
- Initiation of a nationwide compliance review program.[276]

In 1994 OCR took another notable step to increase its emphasis on proactive civil rights enforcement. OCR adopted a "Strategic Plan" that focuses on streamlining OCR's civil rights implementation and enforcement activities to fulfill OCR's mission, which is "To Ensure Equal Access to Education and to Promote Educational Excellence Throughout the Nation through Vigorous Enforcement of Civil Rights."[277] The Strategic Plan sets forth three major goals for OCR:

1) Impact on students' lives
2) Empowerment of students and parents
3) Investment in people[278]

The plan also describes specific objectives, with performance standards and short- and long-term strategies, for accomplishing the goals.[279] The Strategic Plan has several major thrusts that, to the extent that they are implemented, will redirect OCR's civil rights enforcement activities over the next several years and change the way OCR conducts its business.

OCR's first goal is to have an "impact on students' lives"[280] by "maximizing the impact of available resources on civil rights in education"[281] and "setting priorities to ensure that OCR addresses the most acute problems of discrimination."[282] To accomplish this goal, the plan states that "OCR will move from a reactive system of almost exclusively responding to complaints to a balanced enforcement approach that proactively targets its resources for maximum impact"[283] and calls for OCR to devote 40 percent of its resources, in the short term, to proactive measures, such as compliance reviews and the provision of technical assistance.[284] Thus, the plan requires OCR to find ways to free up resources from activities such as complaint processing so that they can be used in proactive enforcement measures. As one means of accomplishing this, the plan calls for OCR to increase its efficiency by "eliminat[ing] practices and procedures that do not add value or do not contribute to the fulfillment of OCR's mission."[285] Notably, in the complaint processing area, the plan calls for OCR to improve its complaint processing by providing for "faster, more flexible and less bureaucratic handling of complaint resolution."[286] The plan also declares that "OCR will effect positive change through uniformly strong remedies to civil rights violations." The plan stresses the need for OCR to develop and use "strong remedial models."[287] OCR measures its success with this goal by the number of students it is able to help and by its ability to process complaints without a backlog.[288]

In moving resources to proactive measures, OCR seeks to balance its proactive activities with its complaints activities by focusing on students and communities that do not file complaints. For example, it has been striving to reach a balance in resources with its section 504 activities. In 1993 approximately 66 percent of OCR resources were spent on section 504 complaints. As a result of its proactive targeting, OCR has reduced that figure to 60 percent, not by reducing section 504 activity but by increasing its activities in areas other than complaints.[289]

OCR's second goal is the "empowerment of students and parents."[290] The plan calls for OCR to develop "clearly articulated policy" that is "readily understandable by the public and implementable by educational institutions"[291] and to promote and disseminate models of civil rights compliance that work.[292] The plan also calls for OCR to "become a partner to local beneficiary and advocacy groups and other entities."[293]

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[275]U.S. Department of Education, Office for Civil Rights, *National Enforcement Strategy: FYs 1991-1992*, Dec. 11, 1990., pp. 2-4.
[276]Ibid., pp. 4-5.
[277]OCR Strategic Plan.
[278]Ibid.
[279]Ibid.
[280]Ibid., p. 1.
[281]Ibid.
[282]Ibid.
[283]Ibid.
[284]Ibid.
[285]Ibid., p. 3.
[286]Ibid.
[287]Ibid., p. 2.
[288]Cantú interview, p. 2.
[289]Ibid.
[290]OCR Strategic Plan, p. 4.
[291]Ibid.
[292]Ibid., p. 5.
[293]Ibid., p. 6.

OCR's third goal is "investment in people."[294] The plan calls for OCR to invest in its people through recruiting and training motivated and able staff; using appropriate technology to ensure that all OCR staff have "ready access to OCR policy, survey information and case processing data via an electronic network," giving the public access to the information it needs; promoting electronic communications among staff throughout OCR; and modeling workplace fairness.[295]

The Strategic Plan calls for OCR to use "Issue Area Teams" with substantive expertise in top priority areas to further its goals.[296] Under the plan, the issue area teams are to serve several purposes. They are to facilitate the development of strong remedial plans,[297] develop and disseminate policy in top priority areas,[298] and disseminate "models that work"—models that are educationally vouched for, transferable, and systemic and preventive in nature.[299]

According to the Assistant Secretary for Civil Rights, the Strategic Plan is "a living document that is updated continuously."[300] OCR actively uses the Strategic Plan in the annual enforcement docket process, for budget and resource allocation, for human resources and labor-management issues, and for training.[301] In addition, OCR assesses the impact of the Strategic Plan through information gathered locally.[302] There is no indication, however, that OCR involves the program offices in the development of its Strategic Plan. Although OCR circulates its proposed regulations and policies to program offices to "ensure[] that programmatic concerns are fully considered in the development of civil rights policy guidance,"[303] it does not similarly ensure that programmatic concerns are considered in OCR's strategic planning.

OCR's fiscal year 1996 budget request to Congress indicated that OCR would continue pursuing its strategy to find ways that the office can respond to complaints and at the same time to a balanced enforcement approach that targets resources for maximum impact.[304] As part of that effort, OCR announced that it would target its proactive enforcement activities to the following "priority areas":

- possible discrimination in admissions, testing, and assessment;
- overrepresentation of minorities in special education and low track courses;
- underrepresentation of women, girls, and minorities in math, science, and high-track courses;
- access to programs for limited-English-proficient students;
- racial and sexual harassment;
- gender equity in athletics; and
- higher education and elementary and secondary desegregation.[305]

According to the budget request, OCR planned to expend at least 40 percent of its resources doing compliance reviews and technical assistance related to these priority issues.[306] With these priority areas, OCR does not "rank" civil rights issues because it views all civil rights issues as equally important.[307] OCR tries to achieve a balance nationally of its work in civil rights issues. For example, OCR's greatest success in its traditional enforcement activities and its most frequent source of complaints has been in the area of disabilities, section 504.[308] Overrepresentation of minority students in special education, however, is an area that has been neglected through traditional enforcement. To balance the issues, OCR has brought more attention to the overrepresentation issue through proactive activities.[309]

The budget request also identified a number of accomplishments related to its Strategic Plan. These included the issuance of a new Complaint Resolution Manual (discussed below) to streamline the handling of complaints and free up resources for other enforcement activities, the development of a Case Information System to permit all staff access to complaint and compliance review data, and the development of an Operational Planning System so that each OCR component could produce "concrete action plans" to fulfill the objectives of the Strategic Plan.[310]

Each year, each OCR component prepares a proposed enforcement docket for review by the Assistant Secretary. In March 1995, Assistant Secretary Cantú sent a memorandum to OCR senior staff

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[294]Ibid.
[295]Ibid., pp. 6-9.
[296]Ibid., p. 2.
[297]Ibid.
[298]Ibid., p. 4.
[299]Ibid., p. 5.
[300]Cantú interview, p. 1.
[301]Ibid.
[302]Ibid., p. 2.
[303]OCR, Information Request Response, General Attachment No. 1.
[304]OCR FY 1996 Budget Request, p. Z-13.
[305]OCR FY 1996 Budget Request, p. Z-13.
[306]Ibid. *See also* OCR, FY 1996 Enforcement Docket, p. 3.
[307]Cantú interview, p. 2.
[308]Ibid., pp. 2-3 (OCR receives over 3,000 section 504 complaints primarily in the area of testing. In fact, although OCR has very few cases pending before administrative judges, all of the cases in the hearing process are section 504 complaints.).
[309]Cantú interview, p. 2.
[310]Ibid., p. Z-14.

providing instructions for the development of the fiscal year 1996 enforcement docket.[311] The memorandum instructed OCR components to include a proposed docket of proactive enforcement activities. The docket should propose "cases" or compliance reviews that the enforcement office intends to initiate.[312] Information provided relating to each proposed case should include discussions on: the targeted student population and the nature of the civil rights problems they face, the approach to developing a strong educationally sound remedy, and how OCR will ensure that the results are achieved.[313] The docket also is to provide a summary analysis of the office's proposed staff usage by issue area and by activity.[314] OCR has set a goal of targeting 40 percent of its resources to proactive enforcement activities. If an office proposes to allocate more or less than 40 percent of its resources to proactive activities, the proposed enforcement docket should explain why.[315] The docket also should include a summary discussion of cases that are anticipated to go to enforcement, open proactive enforcement activities, and other cases, including complaints over 365 days old and particularly sensitive cases.[316]

Management Reforms and Initiatives

From its inception in 1980, OCR has developed management reforms and initiatives designed to facilitate the efficient implementation of its mission and responsibilities. Throughout OCR's 15-year history, the agency's management initiatives have focused on such issues as quality assurance, staff training and development, and technological advances in case processing.[317] However, it was not until the 1990s that OCR began to institute major reforms in these areas.[318]

In FY 1980, its first fiscal year, OCR informed Congress that it had developed a "quality assurance program" and an automated case information management system (ACIMS).[319] OCR's summary of its quality assurance program noted that OCR revised its "Investigative Procedures Manual" (IPM) during FY 1980.[320] During FYs 1981-1982, OCR again focused its management initiatives in the areas of quality assurance, program training, and management information systems.[321] It offered little in the way of any new or innovative approaches in these areas. For example, OCR's description of its quality assurance program for FYs 1981-1982 was largely the same as that for FY 1980.[322] However, one notable addition in FYs 1981-1982 was the development of a "management by objectives" initiative.[323] This program was designed to provide OCR staff "with the capability of tracking significant OCR activities" through "[q]uarterly reports and reviews measuring progress in meeting key organizational priorities."[324]

In FY 1983, OCR informed Congress about the following areas of program management: management information systems, the management by objectives program, the "quality assurance program," headquarters-regional office communications, program training, and a reorganization.[325] With the exception of the reorganization, OCR offered very little new information on any of its management programs.[326] OCR described its 1983 reorganization to Congress in the following way:

> The reorganization, directed by the Assistant Secretary, is designed to increase effectiveness of the compliance program

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[311]OCR, "FY 1996 Enforcement Docket."

[312]Ibid.

[313]Ibid., pp. 7-8.

[314]Ibid., p. 3.

[315]Ibid.

[316]Ibid., p. 4.

[317]*See*, U.S. Department of Education, Office for Civil Rights, *Annual Reports to Congress*, FYs 1980-1995.

[318]*See* U.S. Department of Education, Office for Civil Rights, *Annual Reports to Congress*, FYs 1990-1995.

[319]U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress*, FY 1989, pp. 54-55 (OCR described its quality assurance program as one that "provides a systemic method for measuring the quality of investigative performance through a continuous assessment of randomly selected case files." Ibid. OCR described its "Automated Case Information Management System (ACIMS) as a system that when fully implemented would allow "replace the current manual system and provide accurate, daily updating of case-related data and thereby eliminate the need for many forms, the regions to use data for scheduling and monitoring performance, and free analyst time for other activities." Ibid.

[320]Ibid.

[321]U.S. Department of Education, Office for Civil Rights, *Annual Reports to Congress* FYs 1981-1982, pp. 50-52.

[322]Ibid. p. 50 (reiterating the exact same language used in the FY 1980 report to Congress that "[t]his program provides a systemic method for measuring the quality of investigative performance through a continuous assessment of randomly selected files. Quality indices are generated, numerical measures of relative strengths and weaknesses of individual cases are analyzed, causes of demonstrated performance deficiencies are evaluated, and recommendation offered for remedial action and for improvements in case processing. Recommendations may include development, modification and clarification of substantive policies, procedures, directives and training programs).

[323]Ibid.

[324]Ibid.

[325]U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress* FY 1983, at pp. 53-59.

[326]Ibid.

by more efficient utilization of limited resources. The reorganization also realigns OCR functions to eliminate overlapping responsibilities and unclear lines of authority and transfers some functions to the Department to eliminate duplication of effort, e.g., automated data processing services and non-program training. Under the reorganization, OCR data gathering and data analysis functions will be consolidated into one unit. Another unit will have principal responsibility for operational and technical assistance planning, as well as program training. OCR's quality assurance effort will be given separate programmatic status and will be broadened in scope. In addition, policy and enforcement responsibilities will be realigned to expedite the development of critical policy guidance and headquarters case review.[327]

OCR implemented this reorganization in FY 1984.[328] Under that reorganization, the structure consisted of two Deputy Assistant Secretaries, each with 2 staffs, 3 services, 6 divisions, and 10 branches (as compared to the prereorganization structure that consisted of 1 staff, 3 services, 8 divisions, 21 branches, 4 sections, and 1 unit).[329] In addition the reorganization consolidated OCR's management information systems' monitoring, design, and implementation with data collection and analysis functions in one organizational component.[330] Also in FY 1984 OCR informed Congress that it had upgraded its technological facilities by acquiring electronic mail and related systems.[331]

In FY 1985, OCR did not report on its quality assurance program as it had done in each previous fiscal year.[332] It did, however, report under its program management initiatives on its management information systems, program training, planning documents and program reports, litigation support services, and cost reduction efforts.[333] In reporting on its planning documents and program reports in FY 1985, OCR noted that it had "continued to refine its Management-by-Objectives (MBO) and Performance Management and Recognition System (PMRS) systems, which are separate but fully compatible. The MBO plans set forth organizational goals, objectives, and action plans and PMRS agreements set forth individual performance elements, objectives, and standards, based on the MBO goals and objectives."[334] OCR also reported on its program training, which in FY 1985 included courses on principles of legal analysis, including the use of legal reasoning in improving data analysis and writing skills, mediation and negotiation, and workshops on special language services to students with limited English proficiency, vocational education methods of administration, administrative litigation, the Freedom of Information Act, and sexual harassment.[335] In addition, OCR awarded a contract in FY 1985 for the purchase of litigation support services in handling its administrative litigation responsibilities.[336] Finally, OCR reported that in FY 1985 it made a number of efforts aimed at reducing its program operations costs.[337] These included savings in training programs gained by reducing the number of resource staff engaged in planning courses, videotaping selected presentations, and supplementing written materials with a conference call, in place of original plans for providing formal training.[338]

During the 1980s, OCR reported on far fewer management initiatives and reforms. For example, in FY 1986, OCR reported only briefly on the continued implementation of its management by objectives and performance management and recognition system.[339] With the exception of continued upgrading of its computer technology base, OCR did not report on any new management initiatives undertaken in FY 1986.[340] In FY 1987, OCR reported generally on its "management activities."[341] Again, OCR reported primarily on its continued implementation of upgrades in its computer technology.[342] It also noted that it had streamlined its management by objectives program and

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[327]Ibid., p. 55.
[328]U.S. Department of Education, *Annual Report to Congress* FY 1984, p. 55.
[329]Ibid., pp. 55-56.
[330]Ibid., p. 56.
[331]Ibid., p. 60.
[332]*See* U.S. Department of Education, *Annual Reports to Congress* FYs 1980-1984.
[333]U.S. Department of Education, *Annual Report to Congress* FY 1985, pp. 58-66.
[334]Ibid., p. 61.
[335]Ibid., p. 62.
[336]Ibid., p. 64.
[337]Ibid., p. 65.
[338]Ibid.
[339]U.S. Department of Education, *Annual Report to Congress* FY 1986, pp. 47-48. Management by objectives (MBO) has not been used consistently by any agencies of the Federal Government for several decades. Robert Rideout, Office of Personnel Management, Office of Management and Budget, telephone interview, Aug. 8, 1996. MBO was brought back in 1989 but was discontinued again in 1991 because the White House was not enforcing its use. Ibid. In 1993 the Government Performance and Results Act replaced MBO. *See* Pub. L. No. 103–62 (codified at 31 U.S.C. § 1101 (1988)).
[340]U.S. Department of Education, *Annual Report to Congress* FY 1986, p. 48.
[341]U.S. Department of Education, *Annual Report to Congress* FY 1987, pp. 56-59.
[342]Ibid., pp. 57-58.

that it had convened a task force to review its regional quality assurance program.[343]

OCR informed Congress that during FY 1988 it undertook a number of management activities as part of its "efforts to enhance its efficiency and productivity."[344] These efforts included biweekly meetings between the Assistant Director and headquarters and regional staff; a policy "roundtable discussion" at OCR headquarters in February 1988; continued efforts "to improve the timeliness and substance of information on regional complaint, compliance review, and T[echnical] A[ssistance] activity; and the production of "Data Bulletins" on items of special interest.[345] OCR continued to use and improve the ACIMS management information system.[346] OCR replaced its officewide management by objectives system with two separate planning systems: (1) operating plans for regional components, and (2) activity-oriented workplans for headquarters components.[347] In addition, OCR convened a task force of regional and headquarters staff to review a sampling of the regions' compliance review documentation to evaluate the overall compliance review program.[348] The task force concluded that "all regions were substantially following. . .guidance and that OCR's compliance review program was comprehensive."[349] Finally, OCR undertook extensive efforts to increase the implementation of computer technology through an increase in training and increased staff use of personal computers.[350]

In FY 1989, OCR undertook "a number of significant management activities. . .as part of its ongoing efforts to enhance efficiency and productivity."[351] These included a management review project of all 10 regional offices and a compliance review task force.[352] The management review team recommended that OCR revise almost every area of its work operations.[353] These included: OCR's Investigation Procedures Manual (which OCR had been using since 1980); staff development and training; OCR's quality control and case assessment program; technology needs; and OCR's headquarters and regional organizational structure.[354]

In FY 1990, OCR began to implement some of the recommended changes. For example, in FY 1990, OCR revised its internal procedures for assessing the quality of its case processing activities.[355] The new quality review program included the substantive review of cases by OCR supervisors, attorneys, and managers at critical points during case processing, and the procedural review of cases upon closure.[356] In addition, on an annual basis, a quality review team appointed by OCR's Assistant Secretary conducted substantive postclosure reviews of selected cases to determine the overall quality of OCR's case investigations, to identify areas where additional guidance or training is needed, to recommend procedures for enhancing overall quality, and to modify the quality review program.[357]

In FY 1991, OCR implemented a number of significant management initiatives intended to support and enhance activities related to its National Enforcement Strategy.[358] The "quality review program" revised in 1990, continued to provide for five regional office onsite visits conducted by a "Quality Review Team" consisting of senior OCR headquarters and regional managers with indepth knowledge of civil rights laws, regulations, policies, and investigative procedures. In FY 1991 the Quality Review Team focused on several high-priority issues on its five OCR regional office visits. These included the quality and legal sufficiency of remedies contained in corrective action plans, monitoring of corrective action plans, case processing efficiency, case processing time frames, and overall quality of case processing.[359] In FY 1991, OCR announced a reorganization of its headquarters structure for implementation in FY 1992.[360] During FYs 1991 and

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[343]Ibid., p. 57.

[344]U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress, Fiscal Year 1988*, pp. 58.

[345]Ibid.

[346]Ibid.

[347]Ibid., p. 59.

[348]Ibid.

[349]Ibid., pp. 59–60.

[350]Ibid., p. 60.

[351]U.S. Department of Education, *Annual Report to Congress* FY 1989, p. 55.

[352]Ibid.

[353]Ibid.

[354]Ibid., pp. 55-56.

[355]*See*, U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress: Fiscal Year 1990*, p. 10.

[356]Ibid.

[357]Ibid.

[358]U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress: Fiscal Year 1991*, p. 13.

[359]Ibid., pp. 13-14.

[360]*See* U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress: Fiscal Year 1992*, p. 15 (reporting that: "OCR has been operating within an organizational structure that, except for a few modifications over the years, was designed in 1983. It became apparent that insufficient resources were being devoted to the performance of critical legal, policy, and enforcement activities. Given the significant and unabated increase in complaint receipts, OCR needed to find ways to relieve the workload burden on the regions. . . . To address these problems, in FY 1991 OCR developed a revised headquarters structure that provides for more effective staff utilization,

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1992, OCR enhanced its technological support for the efficient processing of its continually increasing workload by acquiring a large amount of computer equipment.[361]

In FY 1992, OCR's management initiatives included a continued commitment to its quality review program and management control reviews.[362] OCR's quality review program sought to ensure consistent high-quality in the conduct of investigations. In FY 1992 the quality review team continued its focus on several high-priority areas, including the quality and legal sufficiency of remedies contained in corrective action plans, case processing efficiency, and overall quality of case processing.[363]In addition, in FY 1992 management control reviews were conducted of administrative operations, including procurement, travel, personnel, and training activities in the Dallas Regional Office (Region VI) and the San Francisco Regional Office (Region IX). OCR reported that it found "no material weaknesses in the administrative procedures of these regional offices."[364]

In 1993 OCR announced its new emphasis on the "partnership approach."[365] With its emphasis on cooperative efforts, this approach, which remains an important part of OCR's agenda, seeks to build "a partnership with leadership at the Federal, state, and local levels to raise academic standards, encourage the appreciation of diversity, and promote equal access to high-quality education for all the nation's students. OCR's contribution to that partnership is its commitment to enforce the Federal civil rights laws as they apply to all recipients of Federal funding, including schools, universities, libraries, and others."[366] In FY 1993, OCR reported that in renewing its compliance review program it would work "wherever possible in partnership with state and local educational institutions" in seeking "to address civil rights problems early and proactively."[367] In addition, OCR noted that in undertaking further management reform it would rely on the National Performance Review as a "blueprint for a government that works better and costs less.[368] OCR intends to apply the National Performance Review principles of staff empowerment, delayering, and customer orientation to its management initiatives. These will necessitate a greater degree of labor/management partnership than ever before."[369]

In fiscal years 1994 and 1995, OCR's management reforms and initiatives have continued to emphasize the partnership concept and approach. In FY 1994, OCR announced that its management reform would focus on: setting priorities, achieving complaint resolution, technology, and "new ways of doing business."[370] In setting its priorities, OCR has stated that its commitment is "to effectively facilitate strong, educationally sound remedies to civil rights problems."[371] OCR continued to emphasize the partnership theme in the context of setting priorities.[372] In describing its focus on complaint

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reduces some workload burdens on the regions, and eliminates areas of duplication and overlap. By refocusing technical expertise along functional lines, such as moving the training function in to the policy development area, OCR expects the restructured headquarters organization to enhance performance, productivity, and coordination, as well as responsiveness to regional needs.").

[361]*See*, U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress: Fiscal Year 1991*, p. 15 (reporting that: "At the beginning of FY 1991, as for the past several years, many regions were still using outmoded word processors that were slow, cumbersome, and often in need of repair. In FY 1991, OCR spent over $900,000 to acquire more than 230 computers and a large number of laser printers. By bringing OCR to almost a two-to-one ratio of staff to personal computers, we significantly enhanced our ability to handle efficiently our continually increasing workload.").

[362]*See*, U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress: Fiscal Year 1992*, pp. 14-15.

[363]Ibid.

[364]Ibid., p. 15.

[365]Ibid., Assistant Secretary Norma V. Cantú, Foreword, at p. ii.

[366]Ibid.

[367]U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress: Fiscal Year 1993*, pp. 10-11.

[368]The National Performance Review began on March 3, 1993, when President Clinton announced a 6-month review of the Federal Government. President Clinton stated that the goal of the review is "make the entire Federal Government both less expensive and more efficient, and to change the culture of our national bureaucracy away from complacency and entitlement toward initiative and empowerment. We intend to redesign, to reinvent, to reinvigorate the entire national government." Vice President Al Gore, Report of the National Performance Review, *From Red Tape to Results: Creating a Government that Works Better & Costs Less*, Sept. 7, 1993.

[369]Ibid., p. 11.

[370]U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress: Fiscal Year 1994*, pp. 12-13.

[371]Ibid., p. 12.

[372]Ibid. (stating that: "OCR must direct itself toward impact on students' lives. OCR will maximize the impact of available resources on civil rights in education. . . . OCR must work in partnership with students, parents, and educators. OCR will learn to help others to learn to solve their problems of securing equal access to quality education. OCR will focus on systemic education reform that enables communities throughout the nation to understand, commit to and implement strategies that provide opportunities for all to learn. . .OCR must invest in people. OCR will recruit and retain the highest calibre staff, and will develop the training and tools they need to become most effective. OCR will provide an environment that values participation, innovation,

resolution, OCR informed Congress that "OCR has, with extensive internal and external consultation, fundamentally re-engineered its approach to responding to individual complaints of discrimination. These changes move OCR from a system of required investigative procedures to one of flexible resolution approaches. This customized approach to each complainant's concerns is embodied in OCR's new Complaint Resolution Manual. . . . Equally notable, an OCR team produced the new Complaint Resolution Manual in 14 days. From first meeting to actual implementation took only 60 days."[373] Finally, OCR informed Congress that in FY 1994 it had implemented the following technological and human resources management reforms: created a personal-computer-based case information system from the ground up; began initiatives to network and provide electronic communication among all of OCR's regional offices and to provide online access to critical resolution resources through an OCR electronic library; redeployed staff to improve productivity; eliminated bureaucratic practices and procedures that impeded fulfillment of its mission; and established criteria for measuring success in terms of efficiency, quality of work products, and improved morale.[374]

OCR informed Congress that in FY 1995 its management reforms and initiatives (which culminated in a complete structural reorganization implemented in May 1996) in FYs 1993 and 1994 had resulted in a far more efficient and better structured operation.[375] OCR noted that in the past 3 years it had changed its approach to civil rights enforcement from a reactive one to a proactive one.[376] In addition, OCR informed Congress that "[b]y 1995, OCR had built a proactive civil rights law enforcement program that could credibly claim to protect America's most vulnerable students from illegal discrimination. . . . As a result of the changes of the past few years, 87% of OCR staff in FY 1996 work outside of Washington (or in the newly established District of Columbia enforcement office), and virtually all decisions affecting OCR's cases and their resolution are made in the field."[377]

OCR's Budget, Staff, and Workload

OCR's budget appropriation declined from $46.9 million in fiscal year 1981 to a low of $40.5 million in fiscal year 1988. Starting in fiscal year 1989, OCR's appropriation increased each year through fiscal year 1995, when it reached $58.3 million. For part of fiscal year 1996, OCR operated under successive continuing resolutions and was subject to the Federal Government shutdowns in November and December of 1995 and into January 1996. During this period OCR operated with a decreased budget of $53 million.[378] OCR's appropriation for fiscal year 1996 was slightly higher than its budget under the continuing resolutions, but it was curtailed sharply from its fiscal year 1995 budget, declining to $55.3 million.[379] For fiscal year 1997, OCR's budget request to Congress was $60 million.[380] As of July 8, 1996, the House Appropriations Committee was proposing to reduce OCR's budget further in fiscal year 1997, to $54.2 million.[381]

In nominal terms OCR's fiscal resources remain well above their levels for the 1980s. Nevertheless, despite these nominal increases in OCR's appropriations over time, OCR's budget did not keep up with inflation. Although nominally 18 percent higher than OCR's 1981 budget appropriation, OCR's 1996 budget was 28 percent lower in real terms.[382]

OCR's staff size has declined substantially since 1981. Whereas OCR had 1,099 full-time equivalent (FTE) staff in 1981, in 1995 it had 788 FTEs, a reduction of almost 30 percent. An additional decrease of 9 FTEs, to 824 FTEs, has been proposed for fiscal year 1996.[383]

As OCR's staff and monetary resources have declined, the office's workload has increased. The number of complaints received annually, after declining in the early 1980s, began an upward trend in fiscal year 1987. That year, OCR received 1,976 complaints, and the next year, the number of complaints OCR received rose to 3,532. With few exceptions, the number of complaints received has continued to grow each year, reaching a high of 5,856 in fiscal year 1995 and projected to reach 6,349 in fiscal year 1996.[384] In the late 1980s, as the number of complaints OCR received

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and change. OCR will model diversity, fairness and concern for employee well-being.").

[373]Ibid., p. 12.

[374]Ibid.

[375]U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress: Fiscal Year 1995.*

[376]Ibid., p. 1.

[377]Ibid.

[378]Cantú interview, p. 5.

[379]"Fiscal Year 1997 Congressional Action," table, September 12, 1996. *See* table 5.1.

[380]"Fiscal Year 1997 Congressional Action," table, September 12, 1996. Cantú interview, p. 5.

[381]Congressional Quarterly, *House Action Reports*, July 8, 1996, p. 27.

[382]Ibid.

[383]Ibid.

[384]*See* table 5.2.

annually grew, OCR cut back on the number of compliance reviews it initiated. From between 200 and 250 compliance reviews annually in the early 1990s, the number of compliance reviews OCR initiated dropped to 138 in fiscal year 1989 and reached a low of 32 in fiscal year 1990. However, starting in 1991, OCR initiated an increasing number of compliance reviews each year. By fiscal year 1995, OCR was initiating 200 compliance reviews annually, and for fiscal year 1996, this number is expected to remain unchanged.[385]

OCR's Organizational Structure

OCR is headed by an Assistant Secretary for Civil Rights, who reports organizationally to the Deputy Secretary of Education,[386] but reports directly to the Secretary of Education for most matters.[387] The Assistant Secretary for Civil Rights has direct authority over civil rights enforcement for all statutes applying to Department of Education programs.[388] OCR is not responsible for internal equal employment opportunity matters related to Title VII of the Civil Rights Act of 1964. Thus, civil rights enforcement activities are protected from the competing resource and staffing needs of Department of Education's internal civil rights workload.

OCR's Structure Before 1996

Until its 1996 reorganization, in addition to the immediate office of the Assistant Secretary, OCR consisted of two headquarters offices (Policy, Enforcement, and Program Service; and Planning, Analysis, and Systems Service) and 10 regional offices.

Policy, Enforcement, and Program Service

The Policy, Enforcement, and Program Service was responsible for providing policy, programmatic, and legal guidance and support to the regional offices, and other OCR components.[389] Some of the Service's responsibilities were to:

- recommend cases for enforcement;[390]
- conduct administrative proceedings;[391]
- provide support for Federal court litigation;[392]
- serve as OCR's principal liaison with the Office of the General Counsel and the Department of Justice on all case-related and legal matters;[393]
- provide training for OCR staff engaged in compliance and enforcement activities;[394]
- direct OCR's technical assistance activities that facilitate voluntary compliance;[395] and
- provide legal guidance and support to the regional offices.[396]

The Policy, Enforcement, and Program Service had a Litigation Staff and three divisions to perform the aforementioned and other duties.[397]

The Litigation Staff had primary responsibility for conducting administrative proceedings against recipients of Department of Education financial assistance to correct violations of the civil rights laws and for representing OCR in litigation in Federal and State courts.[398] Some related responsibilities included:

- reviewing enforcement cases for legal sufficiency and conformance with established enforcement procedures;[399]
- preparing and reviewing motions, briefs, pleadings, and other legal documents on case-related matters;[400] and
- developing guidance materials and providing training to legal staff in litigation techniques.[401]

The Elementary and Secondary Education Policy Division developed regulations, guidelines, legal standards, and policies pertaining to civil rights compliance; conducted compliance reviews; and provided technical assistance and training to OCR staff engaged in compliance activities.[402] Some of its responsibilities were to:

- prepare and disseminate materials and information in a variety of formats to audiences both within and

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[385] *See* table 5.2.

[386] *See* Office of the Federal Register, National Archives and Records Administration, *The United States Government Manual 1994/95* (Superintendent of Documents: Washington, D.C., 1994), p. 266.

[387] Jeanette Lim, Director, and Susan Bowers, Deputy Director, Policy, Enforcement, and Program Service, Office for Civil Rights, U.S. Department of Education, interview in Washington, D.C., Jan. 26, 1995, p. 1 (hereafter cited as Lim and Bowers January 1995 interview).

[388] *See* Department of Education Survey, Qs. 20, 22, pp. 14, 15.

[389] *1992 Mission Manual OCR/PEPS*, p. 1.

[390] Ibid.

[391] Ibid.

[392] Ibid.

[393] Ibid.

[394] Ibid.

[395] Ibid.

[396] Ibid.

[397] Ibid.

[398] Ibid.

[399] Ibid.

[400] Ibid.

[401] Ibid.

[402] Ibid., pp. 2-4.

outside OCR to explain OCR policy, regulations and related legal concepts and case law;[403]
- identify areas in which the development of legal standards and policies was needed;[404]
- review the Department of Education's and other agencies' regulations and proposed legislation to ensure conformance with civil rights requirements;[405]
- develop and monitor technical assistance contracts;[406] and
- review technical assistance and training materials for conformance with legal requirements.[407]

These duties were performed by the Elementary and Secondary Education Policy Division's three branches:
- Policy Development Branch A was responsible for section 504 of the Rehabilitation Act of 1973;[408]
- Policy Development Branch B was responsible for Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Age Discrimination Act[409]; and
- The Technical Assistance and Program Support Branch assisted the two primary branches.[410]

The Postsecondary Education Policy Division had the same responsibilities as the Elementary and Secondary Division, except that its functions were related to higher education and vocational rehabilitation.[411]

The Program Operations Division determined the compliance status of recipients with respect to a number of civil rights program areas: magnet schools assistance program, vocational education methods of administration program, and statewide higher education desegregation plans.[412] The division's two branches performed various duties such as the following for Regions I–V (Branch A) and Regions VI–X (Branch B):
- evaluated annual civil rights compliance reports submitted by the States pursuant to implementing their methods of administration agreements under the vocational education guidelines, to determine compliance status of each State;[413]
- determined compliance status of applicants for grant funds under the magnet schools assistance program;[414] and
- recommended, implemented, and monitored OCR's delegations of civil rights authority with other Federal agencies.[415]

Planning, Analysis, and Systems Service

The Planning, Analysis, and Systems Service was responsible for monitoring OCR's operational planning efforts, ensuring that the Assistant Secretary's long-range priorities were translated into fiscal year goals and objectives, and for evaluating OCR's efficiency and effectiveness in meeting these goals.[416] Its key responsibilities included:
- developing, maintaining, and monitoring OCR information systems and providing authoritative advice and assistance to all of OCR on technological matters;[417]
- analyzing and reporting on OCR workload activities to audiences within and outside OCR;[418]
- designing indepth civil rights surveys, analyzing collected data, and developing and implementing a system for data dissemination, both within OCR and to other interested parties;[419] and
- providing statistical support for OCR compliance activities, such as complex compliance reviews or complaint investigations involving collection and analysis of data.[420]

The Policy, Analysis, and Systems Service had a Planning and Analysis Division and an Information Systems and Surveys Division.[421]
- The Planning and Analysis Division served as the liaison between the Service and other components of OCR.[422] It translated the long-range goals and objectives into effective and efficient operations, and evaluated the regions' and headquarters' milestones in meeting these goals and objectives.[423] The division was the focal point for workload and productivity analyses and reporting for the Assistant Secretary, other OCR components, and external audiences.[424] The Operations Planning and

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[403]Ibid., p. 2.
[404]Ibid.
[405]Ibid., p. 3.
[406]Ibid.
[407]Ibid.
[408]Ibid., p. 2.
[409]Ibid.
[410]Ibid., p. 3.
[411]Ibid., p. 4.
[412]Ibid., p. 5.
[413]Ibid.
[414]Ibid.
[415]Ibid.
[416]*1992 Mission Manual OCR/PASS*, p. 1.
[417]Ibid.
[418]Ibid.
[419]Ibid.
[420]Ibid.
[421]Ibid.
[422]Ibid.
[423]Ibid.
[424]Ibid., p. 2.

Evaluation Branch and the Reports and Analysis Branch performed duties such as:

- recommending procedures for implementing OCR-wide goals and objectives, and reporting on OCR's progress;[425]
- developing and revising planning documents, as needed to reflect changing priorities or circumstances and findings of evaluative studies;[426]
- preparing the base-year Department of Justice Implementation Plan and its updates;[427]
- producing monthly, other periodic, and comprehensive year-end reports analyzing OCR's workload and productivity;[428]
- preparing an annual report to Congress;[429] and
- responding to ad hoc requests from a variety of sources both within and external to OCR for quantitative analyses of workload and productivity data.[430]

The Information Systems and Surveys Division designed, implemented, maintained, and monitored information systems that collected data on all program operations, and ensured collection on a timely and accurate basis.[431] The division provided OCR with its automated data processing services, along with appropriate guidance and support.[432] The Information Systems Branch and Surveys and Statistical Support Branch performed responsibilities such as:

- conducting studies on OCR procedures for collecting, storing, retrieving, and analyzing information, as well as procedures for reducing costs and improving quality;[433]
- developing and monitoring contracts relating to technology;[434]
- designing indepth surveys reflecting broad-based civil rights issues, as well as conforming to state-of-the-art survey design techniques;[435]
- coordinating with other Department of Education offices and external agencies on matters involving surveys and data collection strategies;[436] and
- conducting research to assess the long-range impact of external factors (e.g., demographics) on OCR's civil rights compliance responsibilities.[437]

OCR Regional Offices

OCR's primary staff functions were to investigate and resolve allegations of discrimination, conduct compliance reviews, monitor corrective action plans, and provide technical assistance.[438] Moreover, activities such as enforcing civil rights statutes and regulations by investigating complaints of discrimination, conducting compliance reviews, and providing technical assistance to beneficiaries of Federal education programs were charged to the regional offices.[439] The regional offices performed the majority of OCR responsibilities, with headquarters providing support and coordination.[440] In 1992, for instance, OCR devoted nearly 90 percent of staff resources to the enforcement activities of investigating, mediating, and processing complaints of violations of equal educational opportunity.[441]

Although all of the regional offices were under the supervision of a Regional Director and performed the same functions, they were organized based upon the region's structure, assigned staffing, and workload.[442] Each of the 10 Regional Directors reported to the Deputy Assistant Secretary for Civil Rights, and provided direction and coordination, in most cases, to two staffs and two divisions:

- Elementary and Secondary Education Division;
- Postsecondary Education Division;
- Program Review and Management Support Staff; and
- Civil Rights Attorneys Staff.

In some regions, a single Compliance Division replaced the two major Divisions.[443]

Regional Office Divisions. All three divisions performed the same general functions.[444] While the Elementary and Secondary Education Division focused on K-12 and vocational-technical schools, the Postsecondary Education Division's functions were related to institutions of postsecondary education and vocational rehabilitation agencies and providers.[445] The

[425]Ibid.
[426]Ibid.
[427]Ibid.
[428]Ibid., p. 3.
[429]Ibid.
[430]Ibid.
[431]Ibid.
[432]Ibid.
[433]Ibid., p. 4.
[434]Ibid.
[435]Ibid.
[436]Ibid., p. 5.
[437]Ibid.
[438]U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information*, (undated), p. 91.
[439]OCR FY 1996 Budget Request, p. Z-10.
[440]Ibid.
[441]U.S. Department of Education, Office for Civil Rights, *FY 1992 Annual Report to Congress*, p. 4.
[442]*1992 Mission Manual OCR/OR*, p. 1.
[443]Ibid.
[444]*1992 Mission Manual OCR/RO*, p. 3.
[445]Ibid.

Compliance Division covered K-12, vocational-technical, postsecondary, and vocational rehabilitation institutions.[446] The number of branches in each division was determined by a combination of factors, such as staff allocation, workload intensity, and the feasibility of handling investigations and reviews.[447]

Each region's specific duties in addition to the enforcement, compliance, and technical assistance responsibilities included:

- conducting complaint investigations and compliance reviews of either preschool through secondary institutions (as well as vocational technical schools) or postsecondary institutions and vocational rehabilitation agencies;[448]
- determining compliance status of recipients and negotiating voluntary compliance, or recommending cases for enforcement action; assisting recipients of Department of Education funds as part of the complaint investigation and compliance review process;[449]
- monitoring implementation of remedial action plans;[450] and
- participating in identifying and setting technical assistance priorities to be addressed by OCR in the next fiscal year.[451]

Program Review and Management Support Staff. Under the Regional Director, the Program Review and Management Support Staff performed the following among other duties:

- analyzing, preparing, and providing the Regional Director with information and advice concerning the meeting of OCR program and operations objectives, the number of compliance activities completed, and adherence to OCR compliance decisions and policies;[452]
- collecting regional data and analyzing and monitoring the completion of compliance actions;[453] and
- Performing complaint intake, including determination of jurisdiction and completeness.[454]

Civil Rights Attorneys Staff. Under the leadership of the Regional Director, the Chief Regional Attorney and subordinate legal staff served as legal counsel on policy issues of high visibility and provided legal guidance, advice, and support to the regional offices.[455] The staff provided legal case review, and reviews for legal sufficiency on cases and other matters resolved regionally or by headquarters.[456] Specific responsibilities related to these duties included:

- conducting research on complex questions of statutory and regulatory interpretation, and developing legal theories and lines of argumentation to support Department of Education findings;[457]
- designing and implementing strategies for negotiations, providing final legal review of settlement offers, and preparing case resolution agreements;[458]
- participating in the development of investigate reports, letters of findings, and negotiated settlements;[459]
- determining compliance status of recipients, based on analyses of the evidence, legal research, and application of statutes, regulations, and policies;[460] and
- providing legal representation for OCR in meetings with State and local government officials and their legal representatives.[461]

OCR's 1996 Reorganization

In 1996 OCR implemented a major reorganization consistent with its Strategic Plan, a reorganization structured around its work.[462] According to Assistant Secretary for Civil Rights Norma Cantú, the purpose of the reorganization is to "deliver a stronger civil rights enforcement program, focus energy on internal and external customer service, dramatically reduce layers of review, and redeploy the maximum number of staff to program activities, while maintaining the highest quality in critical support functions."[463] OCR's fiscal year 1996 budget request to Congress indicated that the reorganization would increase the office's productivity, deliver a stronger civil rights enforcement program, and focus on customer service. The budget request also

[446]Ibid.
[447]Ibid., p. 2.
[448]Ibid.
[449]Ibid.
[450]Ibid.
[451]Ibid.
[452]Ibid., p. 4.
[453]Ibid.
[454]Ibid.
[455]Ibid., p. 5.
[456]Ibid.
[457]Ibid.
[458]Ibid.
[459]Ibid.
[460]Ibid.
[461]Ibid.
[462]Cantú interview, p. 3.
[463]Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to Madeleine Kunin, Deputy Secretary, U.S. Department of Education, "OCR Redesign," Sep. 29, 1994 (hereafter cited as Cantú memorandum).

stated that the reorganization involved redeploying staff to program activities, "while maintaining the highest quality in critical support functions."[464]

Although the physical structure of the reorganization appears to have increased layers of review within OCR, Assistant Secretary Cantú notes that, in actuality, the approach has resulted in a "delayering" and "flattening" of OCR's structure for a number of reasons. First, under OCR's old organization, there were several layers of review that appeared in practice although "not on paper." For example, the Regional Directors had to report to a series of Special Assistants before they could reach the Assistant Secretary. With the new reorganization, the field people have more direct access to the Assistant Secretary.[465] Second, overall, OCR has moved to a team management approach in which managers remain directly involved with OCR's customers and cases, and OCR staff members generally have more input when making team decisions.[466]

Brian Ganson, Special Assistant to Assistant Secretary Cantú, indicated that OCR had three major underlying reasons for reorganizing. First, in response to the governmentwide call for reinventing government, OCR reevaluated how it worked and decided that it could improve its effectiveness by adopting a team approach to management. Second, the anticipated downsizing of OCR meant that unless OCR changed the way it operated, it would have to curtail its civil rights enforcement activities dramatically. Third, OCR's organization, which dated from the days when OCR was part of the Department of Health, Education, and Welfare, was not suited to the much smaller OCR in the Department of Education, nor did it reflect recent technological improvements that made interoffice communications easier.[467]

To fulfill the commitment outlined in the Strategic Plan to focus OCR's resources on civil rights enforcement activities, the reorganization plan called for OCR to locate more than 80 percent of its staff in its regional offices and accomplish required staff reductions by making major cuts in the size of its headquarters staff.[468] The reorganization plan called for the number of supervisors at OCR to be reduced drastically, and staff to work in teams, or work groups.[469] The team approach promotes a more time-efficient mechanism for implementing OCR's activities through shared resources and experiences.[470]

The reorganization also implements the notion, in OCR's Strategic Plan, of Issue Area Teams. Under the plan, headquarters office staff were organized into teams specializing in priority issues or particular civil rights statutes.[471] OCR designated issue coordinators among staff at headquarters and in the Chicago office to serve as "point people" on specific issues, such as *Lau* or testing. The issue coordinators are not supervisors; they work with the regional offices to coordinate the sharing of information.[472]

Under the reorganization, OCR's headquarters office consists of the Office of the Assistant Secretary, a Resource Management Team, and a Program Legal Team. The Resource Management Team is comprised, in turn, of four component teams: the Budget and Planning Support Team, the Human Resource Team, the Information Technology Team, and the Customer Service Team.[473] The Customer Service team, in particular, reflects the Strategic Plan's focus on serving OCR's customers. It serves as a single point of contact for any person who is not familiar with OCR.[474] Reflecting the Strategic Plan's emphasis on issue area teams, the Program Legal Team consists of three separate teams organized around issue areas. Currently, the teams are designated as the Desegregation Team, the Within-School Discrimination Team, and the Testing Team, but it is anticipated that the teams' issue assignments will change over time.[475]

In addition to its headquarters office, the reorganized OCR has 12 regional offices, 2 more than before.[476] The new regional offices are the Cleveland Enforcement Office, which previously was a subunit of

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[464]OCR FY 1996 Budget Request, p. Z-12.

[465]Cantú interview, p. 7.

[466]Ibid., p. 6.

[467]Brian C. Ganson, Special Assistant to the Assistant Secretary, Office for Civil Rights, U.S. Department of Education, interview in Washington, D.C., June 24, 1996, pp. 1-2 (hereafter cited as Ganson interview).

[468]Cantú memorandum; *see also* OCR Redeployment Plan, Draft, Sep. 23, 1994, attachment to Cantú memorandum, p. 4. In FY 1996, 87 percent of OCR's staff worked outside of headquarters or in the newly established District of Columbia Metro Enforcement Office.

[469]OCR Redeployment Plan, Draft, Sep. 23, 1994, attachment to Cantú memorandum, p. 4.

[470]According to Assistant Secretary Norma Cantú, "The team approach is essential because time is too important to do things individually or to horde information." Cantú interview, p. 3.

[471]Ibid., pp. 5-6.

[472]Cantú interview, p. 3.

[473]U.S. Department of Education, Office for Civil Rights, organization chart. *See also* "OCR's Organization Chart," provided to Commission staff at Ganson interview.

[474]Ganson interview, p. 3.

[475]Ibid.

[476]U.S. Department of Education, Office for Civil Rights, organization chart. *See also* "OCR's Organization Chart," provided to Commission Staff at Ganson interview.

the Region V (Chicago), and the Washington D.C. Metro Office, which is responsible for the District of Columbia, Virginia, and North Carolina. Fifty-two staff members who previously were in support functions in OCR's headquarters office were assigned to the D.C. Metro Office.[477] The primary reason for the creation of the Cleveland office was that it already had been handling complex cases and reporting through the Chicago office. Since the Cleveland office already was serving customers' interests in the capacity of a separate office, OCR formally placed it on the same level with the other regional offices to make it as accessible to headquarters.[478] OCR created the D.C. Metro office because it wanted to place its highly skilled staff members at headquarters as close to the public as possible. Headquarters staff already had responsibilities for handling or assisting in some of the more complex cases. With the reorganization, OCR wanted these staff members to investigate and resolve complaints directly. According to Assistant Secretary Cantú, "Our goal is to make the best changes for the students. . . . We can accomplish this by putting our experts on the front line."[479]

The regional offices have been renamed "Enforcement Offices" and are organized into four "Enforcement Divisions." Two Senior Enforcement Directors, operating out of the Office of the Assistant Secretary, head the enforcement divisions, with each Senior Enforcement Director having responsibility for two enforcement divisions. Each enforcement office is headed by an "Enforcement Director," who reports to one of the two Senior Enforcement Directors. In addition, the activities of the enforcement offices within each enforcement division are coordinated by "Enforcement Coordinators," who in most instances also are Enforcement Directors for one of the enforcement offices in the division.[480]

The organizational structure of the regional enforcement offices varies. All of the regional offices are organized into teams that conduct complaint investigations, compliance reviews, and other enforcement activities. OCR configured the team structure to "move through complaints as quickly as possible."[481] The teams are led by team leaders and generally consist of attorneys, equal opportunity investigators, and other staff. OCR has placed managers as full members of teams so that the managers can remain in contact with OCR's customers, thus allowing managers to share their expertise with team members and to improve upon it by working directly with the customers.[482]

In some regions, all of the teams have equivalent responsibilities; in others, the teams specialize.[483] For instance, the D.C. Metro Office consists of four compliance and enforcement teams, each consisting of a team leader, two attorneys, six equal opportunity specialists, and three support assistant positions. All of the D.C. Metro Office teams have the same functions and responsibilities, including conducting complaint investigations and compliance reviews, providing technical assistance, and monitoring remedial action plans.[484] The Boston office's teams have more specialized functions. The office consists of five teams: two specialize in resolving complaints, and the other three engage in "proactive" enforcement activities. Each of the teams is headed by a team leader and consists, in addition, of a senior equal opportunity specialist, investigators, attorneys, and an equal opportunity assistant.[485] The New York office has three equivalent "Self-Directed Work Teams," which conduct a full array of enforcement activities, including complaint investigations, compliance reviews, monitoring remedial action plans, and providing technical assistance. The self-directed work teams are led by team leaders and include investigators, attorneys, program analysts, and equal opportunity assistants. The New York office also has a fourth team, called the "Special Projects Unit," that conducts particularly sensitive and complaint civil rights investigations, supports the self-directed work teams, takes on special projects that require quick action, and has other functions that are not suited to the self-directed work teams. The Special Projects Unit is headed by an Associate Regional Officer and includes attorneys, program analysts, and investigators.[486]

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[477]Ibid.; Ganson interview, p. 2.

[478]Cantú interview, p. 6.

[479]Ibid.

[480]Ganson interview, p. 2.

[481]Cantú interview, p. 3.

[482]Ibid.

[483]*See* U.S. Department of Education, Office for Civil Rights, organizational charts and function statements provided to the Commission after the Ganson interview.

[484]U.S. Department of Education, Office for Civil Rights, Washington Regional Office (Metro), organizational chart and "Proposed Functional Statement," provided to the Commission after the Ganson interview.

[485]U.S. Department of Education, Office for Civil Rights, "Proposed Region I Reorganization," Oct. 19, 1995 and "Proposed Functional Statement," provided to the Commission after the Ganson interview.

[486]U.S. Department of Education, Office for Civil Rights, "ED/OCR Region II Proposed Structure," and "Proposed Functional Statement," provided to the Commission after the Ganson interview.

OCR is managed by the Assistant Secretary's Council, a senior management team made up of the Assistant Secretary, the Deputy Assistant Secretary, the Director of the Resource Management Team, the Director of the Program Legal Team, the two Senior Enforcement Directors and the four Enforcement Coordinators. The council coordinates and makes decisions for OCR. For instance, the council works on budget issues and makes final policy decisions for OCR.[487] According to one member of the council, the inclusion of enforcement coordinators in the council gives OCR's regional offices (enforcement offices) a real voice in the decisions that are made, whereas previously, all major decisions were made by OCR's headquarters.[488]

Regulations, Policies, and Other Guidance

Regulations

The Department of Education has published regulations for Title VI,[489] section 504,[490] and Title IX.[491] These regulations implement the civil rights statutes and provide guidance as to rights and responsibilities under the acts.

Title VI Regulations

The Department of Education's current Title VI regulations are those originally written for the U.S. Department of Health, Education, and Welfare. Stating that "No person in the United States, shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination . . .," the Title VI regulations generally prohibit discrimination by recipients of financial assistance from the Department of Education. The regulations provide further elaboration as to what constitutes prohibited discrimination by providing the following examples of specific discriminatory actions that are prohibited:

(i) deny an individual any service, financial aid, or other benefit provided under the program;

(ii) provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) deny an individual an opportunity to participate in the program through the provision of services or otherwise to afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee . . .;

(vii) deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.[492]

The regulations further prohibit using "criteria or methods of administration which have the effect of subjecting individuals to discrimination"[493] in determining the types of services or benefits to provide or determining the site or location of program facilities in such a way as to have the "effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination."[494] The regulations obligate recipients who have previously discriminated to "take affirmative action to overcome the effects of prior discrimination"[495]

and permit affirmative action to "overcome the effects of conditions that limited participation by persons of a particular race, color, or national origin."[496] The regulations contain specific provisions relating to the development and implementation of education programs for students who are members of national origin minorities and have limited English proficiency. Finally, the regulations clarify that the coverage of Title VI extends to employment discrimination in programs that receive financial assistance from the Department of

[487] Ganson interview, pp. 2-3.
[488] Linda McGovern, Enforcement Coordinator, Division C, and Enforcement Director, Chicago Enforcement Office, interview in Washington, D.C., June 26, 1996, p. 4 (hereafter cited as McGovern interview).
[489] 34 C.F.R. Part 100 (1994).
[490] 34 C.F.R. Part 104 (1995).
[491] 34 C.F.R. Part 106 (1994).
[492] 34 C.F.R. § 100.3(b).
[493] *Id.* § 100.3(b)(2).
[494] *Id.* § 100.3(b)(3).
[495] *Id.* § 100.3(b)(6).
[496] *Id.*

Education if providing employment is a primary purpose of the program as well as if employment discrimination tends to result in discrimination against the intended beneficiaries of the program.[497]

The regulations require that all applicants for and recipients of Department of Education assistance provide assurances that they will operate in compliance with Title VI. State agencies receiving funding for continuing State programs must, in addition, submit methods of administration showing how they intend to ensure that they and their subrecipients are in compliance with Title VI.[498] The regulations also require recipients to cooperate with the Department of Education in keeping records and submitting compliance reports to permit the Department to ascertain their compliance, and to permit access to their books, records, accounts, and other sources of information during normal working hours, as necessary.[499]

The regulations give basic procedures for the Department of Education's enforcement of Title VI. They provide that the Department shall conduct periodic compliance reviews and investigate complaints of discrimination.[500] When the Department's investigation finds a recipient in noncompliance, the regulations require the Department to attempt to resolve the situation informally before undertaking formal enforcement measures. If a recipient will not enter into compliance voluntarily, the Department can (1) suspend, terminate, or refuse to grant or continue assistance to the recipient; (2) refer the matter to the U.S. Department of Justice for enforcement in court; or (3) use "other means authorized by law" to obtain compliance.[501] The regulations provide recipients against whom enforcement measures are proposed an opportunity for a hearing and contain basic procedures for such hearings.[502] They provide that all enforcement actions taken by the Department of Education are subject to judicial review.[503]

Section 504 Regulations

The Department of Education's regulations for section 504 prohibit discrimination by recipients of Department of Education financial assistance on the basis of handicap. Unlike the Title VI regulations, they contain much more detailed information on what constitutes discrimination under the act, and they lay out specific procedures that must be followed by recipients to ensure that persons with disabilities are given due process rights to equal access to federally funded education programs.

Using language similar to that in the Title VI regulations and based on the section 504 statute, the section 504 regulations provide the following general prohibition against discrimination on the basis of handicap by Department of Education recipients: "No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance."[504]

The section 504 regulations provide a detailed list of discriminatory actions prohibited that is similar to that contained in the Title VI regulations. However, rather than emphasizing equal treatment, the regulations emphasize providing individuals with handicap with benefits and services that are "as effective" as those provided nondisabled individuals.[505] Furthermore, throughout, the examples apply only to services provided to disabled individuals who are "qualified." In contrast to the Title VI regulations that prohibit providing services "different[ly]) or "in a different manner," for instance, the section 504 regulations prohibit "afford[ing] a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that *is not equal to* [emphasis added] that afforded others" or providing services that are not "as effective as" those provided others.[506] Although they generally prohibit the provision of separate or "different" services for disabled individuals, they permit different services "when such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are *as effective as* (emphasis added) those provided to others." The regulations provide the following clarification:

> [A]ids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.[507]

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[497] *Id.* § 100.3(c).
[498] *Id.* § 100.4.
[499] *Id.* § 100.6.
[500] *Id.* § 100.7.
[501] *Id.* § 100.8.
[502] *Id.* §§ 100.9, 100.10.
[503] *Id.* § 100.11.

[504] 34 C.F.R. § 104.4(a).
[505] *See id.*, § 104.4(b).
[506] *Id.* § 104.4(b)(ii)-(iii).
[507] *Id.* § 104.4(b)(2).

The regulations contain special emphasis on ensuring that disabled individuals are served together with their nondisabled peers to the greatest extent possible. In particular, the regulations state, "a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different."[508]

Like the Title VI regulations, the section 504 regulations prohibit actions that have "the effect of" discriminating.[509] However, they require that recipients undertake "remedial action" (as opposed to "affirmative action") to correct past discrimination against specific individuals. The remedial action required is at the discretion of the Secretary of Education, but a recipient can be required to take remedial action to overcome prior discrimination against a disabled beneficiary by another recipient.[510]

The section 504 regulations contain specific requirements of recipients that have no counterparts in the Title VI regulations. First, the regulations require all recipients to conduct a self-evaluation to determine their compliance status and, upon consultation with disabled and other individuals, modify their practices and take such remedial actions as necessary. In addition, the regulations require all recipients with 15 or more employees to maintain a list of the persons consulted, and a summary of problems found, modifications made, and remedial steps taken.[511] Second, the regulations require all recipients with 15 or more employees to designate a specific person responsible for compliance with section 504 and to "adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited. . . ."[512] Furthermore, recipients with 15 or more employees must take "appropriate initial and continuing steps" to notify all participants, beneficiaries, applicants and employees of its nondiscrimination policy and provides several examples of what such steps entail.[513]

Unlike Title VI, the section 504 statute and regulations contain a blanket prohibition against employment discrimination by recipients of Federal financial assistance.[514] In addition, for recipients of financial assistance under the Individuals with Disabilities Education Act, the regulations impose an affirmative requirement that recipients "take positive steps to employ and advance in employment qualified handicapped persons."[515] The regulations are very specific about the extent of the prohibition on employment discrimination, stating that the prohibition applies to:

- recruitment, advertising, and processing applications for employment;
- hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
- rates of pay or any other form of compensation and changes in compensation;
- job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
- leaves of absence, sick leave, or any other leave; and
- fringe benefits available by virtue of employment, whether or not administered by the recipient.[516]

The regulations clarify that recipients of Federal financial assistance may not "limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap"[517] and may not engage in contractual or other relationships that have the effect of subjecting employees to discrimination based on disability.[518] The regulations specifically prohibit using tests or other selection criteria that tend to "screen out" disabled individuals unless the criteria can be shown to be job-related and no other selection criteria could be used; the regulations also require recipients to ensure that whatever criteria they use accurately reflect an applicant or employee's job skills.[519] In addition, the regulations prohibit recipients from making preemployment inquiries about an applicant's disability except in very limited circumstances.[520]

Furthermore, the regulations direct recipients to make "reasonable accommodation" for disabled applicants and employees unless they can demonstrate that such would cause "undue hardship."[521] The

[508] *Id.* § 104.4(3).
[509] *Id.* §§ 104.4(3),(4).
[510] *Id.* § 104. 6.
[511] *Id.* § 104.6(c).
[512] *Id.* § 104.7.
[513] *Id.* § 104.8.
[514] *Id.* § 104.11(a)(1).
[515] *Id.* § 104.11(a)(2). The regulations are not strictly "section 504" regulations, but instead are regulations for all nondiscrimination statutes related to disability. The only provision in the regulations that is not a section 504 regulation is the requirement that recipients of Education of the Handicapped Act assistance take positive steps to promote the employment of disabled individuals.
[516] *Id.* § 104.11(b).
[517] *Id.* § 104.11(a)(3).
[518] *Id.* § 104.11(a)(4).
[519] *Id.* § 104.13.
[520] *Id.* § 104.14.
[521] *Id.* § 104.12(a).

regulations provide several examples of what reasonable accommodation may include and also provide guidance on what might constitute undue hardship under section 504.[522]

A third part of the section 504 regulations addresses discrimination in program accessibility, prohibiting excluding a disabled individual or otherwise discriminating on the basis of disability because of the inaccessibility of the recipient's facilities.[523] The regulations require school districts "to educate or. . .provide for the education of each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person."[524] The regulations require that the education be in a regular educational setting unless the recipient can show that it cannot, with the use of supplementary aids, educate the disabled person satisfactorily in a regular educational setting.

The regulations specify that disabled individuals shall be able to participate in nonacademic activities with nondisabled students to the "maximum extent appropriate to the needs of the handicapped person in question."[525] Finally, if a disabled student has to be served in a separate facility, that facility must be comparable to that provided nondisabled students.[526] The regulations also prohibit discrimination in counseling and the use of appraisal and counseling materials.[527] These provisions promote access for persons with disabilities to the same quality of education and options available to nondisabled persons.

The program accessibility part of the section 504 regulations also includes detailed procedural requirements for public elementary and secondary schools. It requires that schools conduct an evaluation of each student suspected of having a disability before any placement decision is made regarding the student.[528] Schools must have evaluation standards and procedures that ensure that tests used in evaluating students (1) have been validated for the purpose for which they are used and are administered by trained personnel; (2) are tailored to asses specific areas of educational needs; and (3) test what they purport to measure rather than reflecting students' disabilities.[529] Schools also must have placement procedures that use multiple sources of information and that ensure that all sources of information used are documented and considered carefully; that placement decisions are made by a group of persons, including persons knowledgeable about the child being placed, about the meaning of the evaluation data, and about placement options; and that placement decisions are consistent with the requirement that students be educated in a regular educational setting to the greatest extent possible.[530] Finally, schools must establish procedures for periodic reevaluation of students who are receiving special education or related services.[531]

The program accessibility part of the section 504 regulations also requires that schools have in place procedural safeguards to ensure that its identification, evaluation, and placement decisions do not discriminate. These safeguards include notice, an opportunity for parents or guardians to examine relevant records, have an impartial hearing with representation by counsel, and a review procedure.[532]

Finally, the section 504 regulations contain sections addressing requirements for preschool and adult education programs,[533] private education programs,[534] postsecondary education.[535] and health, welfare, and social services[536] that do not apply to the public elementary and secondary institutions discussed in this report.

Title IX Regulations

The Department of Education's Title IX regulations, like its section 504 regulations, are much more specific than its Title VI regulations on what actions and practices are prohibited. Like the section 504 regulations and unlike the Title VI regulations, they require that each recipient designate a person or persons to coordinate the recipient's Title IX compliance efforts and establish complaint procedures.[537] Furthermore, the regulations contain detailed notification requirements for recipients.[538] However, because of the content of the statute, they do not contain the specific procedural and due process requirements that are included in the section 504 regulations.

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[522] *Id.* §§ 104.12(b),(c).
[523] *Id.* § 104.21.
[524] *Id.* § 104.34(a).
[525] *Id.* § 104.34(b).
[526] *Id.* § 104.34(c).
[527] *Id.* § 106.36.
[528] *Id.* § 104.35(a).
[529] *Id.* § 104.35(b). Title II of the ADA is interpreted consistent with these provisions.
[530] *Id.* § 104.35(c).
[531] *Id.* § 104.35(d).
[532] *Id.* § 104.36.
[533] *Id.* § 104.38.
[534] *Id.* § 104.39.
[535] *Id.* subpart E.
[536] *Id.* subpart F.
[537] 34 C.F.R. § 106.8 (1995).
[538] *Id.* § 106.9.

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The Title IX regulations are subdivided, with sections addressing discrimination in admission and recruitment, discrimination in education programs and activities, and discrimination in employment in education programs and activities.[539] Within these sections, there are provisions clarifying prohibitions as they apply to elementary and secondary education, higher education, and employment. For example, they address specific topics, such as housing at educational institutions, access to public elementary and secondary schools, counseling, financial aid, marital or parental status, athletics, employment criteria, and job classification and structure. For the recipients, beneficiaries, employees, and other individuals affected by federally assisted programs, this specificity assists them in understanding their rights and responsibilities under the Federal regulations.

Unlike Title VI and section 504, Title IX does not apply uniformly to all recipients of Federal financial assistance. The Title IX regulations clarify that its nondiscrimination requirements do not apply to recipients that are religious organizations if they are inconsistent with the religious tenets of the organizations; do not apply to educational institutions that are primarily military training institutions; and do not apply to membership practices of sororities, fraternities, the YMCA, the YWCA, Girl Scouts, Boy Scouts, Camp Fire Girls or single-sex voluntary youth service organizations.[540] Furthermore, the regulations exempt traditionally single-sex public (but not private) institutions from the requirements relating to nondiscrimination in admissions and recruitment.[541]

The Title IX regulations prohibit discrimination on the basis of sex in admission to educational institutions that are institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education (except for those that are traditionally single-sex institutions).[542] Thus, the regulations do not clearly prohibit sex discrimination in admissions by elementary and secondary educational institutions. Because local education agencies are obliged to admit all children who live within their boundaries, an admissions discrimination prohibition may be irrelevant to them.

The Title IX regulations give several specific examples as to what constitutes prohibited discrimination in admissions. These include:

- giving preference to one student over another on the basis of sex (including admitting students based on separate ranked lists by sex);[543]
- placing numerical restrictions on the number of students of either sex who may be admitted;[544] and
- using tests or other criteria for admission that have an "adverse effect" on the basis of sex, unless such criteria are shown to be educationally valid and other criteria are not available.[545]

The Title IX regulations require a certain minimum threshold of equality in the services, facilities, and resources used in that they must be comparable to the services, facilities, and resources provided to students of the other sex. The regulations proscribe recipients from having admissions policies relating to marital or parental status that differ by sex, from discriminating in admissions based on pregnancy, from treating pregnancy-related disabilities differently from other temporary disabilities, and from making preadmission inquiries about applicants' marital status.[546] Finally, the regulations prohibit recipients from giving admissions preferences to applicants who have attended an institution that is predominantly of one sex, from discriminating on the basis of sex in the recruitment of students, and from recruiting primarily at single-sex institutions.[547]

The Title IX regulations also prohibit discrimination on the basis of sex in education programs and related activities. This prohibition applies to "any academic, extracurricular, research, occupational training, or other education program or activity" operated by a recipient. The regulations provide a number of specific examples of what is prohibited; they also require recipients to ensure that discrimination does not occur in programs the recipient offers but does not operate itself. The regulations address housing and physical education facilities, providing that separate housing and physical education facilities are allowable, but that housing for both sexes should be comparable.[548]

The Title IX regulations have specific provisions that relate to elementary and secondary schools and that address particular topics, such as testing, access to course offerings, access to schools operated by local public school systems, and counseling. For example, the Title IX provisions promote equal access to all course offerings regardless of sex, and they provide as specific

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[539] *See* 34 C.F.R. Part 106 (1995).
[540] *Id.* §§ 106.12-106.14.
[541] *Id.* § 106.15(e).
[542] *Id.* §§ 106.15(c),(d),(e).
[543] *Id.* § 106.21(b)(1)(i).
[544] *Id.* § 106.21(b)(1)(ii).
[545] *Id.* § 106.21(b)(2).
[546] *Id.* § 106.21(c).
[547] *Id.* §§ 106.22,106.23.
[548] *Id.* §§ 106.32,106.33.

examples course offerings traditionally subject to gender stereotypes, such as health, physical education, industrial, business, vocational, technical, home economics, and music. The Title IX regulations address the issue of ability grouping in physical education classes and activities only and acknowledge that there is no prohibition of grouping of students by ability as long as the students are assessed by objective standards of individual performance without regard to sex.

A provision of particular relevance to elementary and secondary education institutions is the requirement that recipients "not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such a basis."[549] The regulations provide limited exceptions to this provision for contact sports in physical education classes, sex education classes, and single-sex choruses based on vocal range and quality. In addition, the regulations proscribe local education agencies from excluding persons from admission to vocational education institutions or other educational units they operate on the basis of sex.[550] The regulations also address sex discrimination in counseling and the use of appraisal and counseling materials.[551]

Based on the language of the statute, the Title IX regulations contain a blanket prohibition against employment discrimination based on sex by recipients of Federal financial assistance.[552] The regulations contain specific provisions clarifying the prohibition as it applies to employment criteria,[553] recruitment,[554] compensation,[555] job classification and structure,[556] fringe benefits,[557] marital and parental status,[558] advertising,[559] preemployment inquiries,[560] and sex as a bona fide occupational qualification.[561]

The Title IX regulations, like the 504 regulations, contain a specific self-evaluation requirement of recipients that has no counterpart in the Title VI regulations. The regulations require all recipients to conduct a self-evaluation to determine their compliance status and, upon consultation with disabled and other individuals, to modify their practices and take such remedial actions as necessary.[562] The regulations, however, require only an initial self-evaluation to be conducted within 1 year of the effective date of the regulations. They do not require recipients to conduct continual, periodic self-assessments.

Discussion

The Title VI regulations are much less specific than either the Title IX regulations or the section 504 regulations. Furthermore, they do not contain the procedural protections that were incorporated in the section 504 regulations.[563] The greater specificity of the section 504 regulations provides the general public with clearer guidance about their rights and responsibilities under the law. OCR staff and officials noted that the general public has little understanding of Title VI in comparison to section 504. The head of the Philadelphia Enforcement Office stated that because the issues covered under Title VI are more subtle than those under section 504, the public is not as sensitive to them as they are to section 504 issues.[564] Thus, potential complainants are not substantially aware of their rights under Title VI.[565] The head of the Dallas Enforcement Office indicated that section 504 in general, and its regulations in particular, were given much more attention and support than the Title VI regulations.[566]

The public's lack of awareness and understanding of Title VI suggests the need for clearer, more specific Title VI regulations to ensure that recipients and beneficiaries have a clear understanding of their rights and responsibilities under Title VI.[567] However, OCR staff offered varying opinions about whether the Title VI regulations should be revised to make them more similar to the section 504 regulations. A staff member in the Dallas Enforcement Office supported such a move, saying that if the Title VI regulations were more specific, OCR would receive more Title VI complaints,

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[549] *Id.* § 106.34.
[550] *Id.* § 106.35.
[551] *Id.* § 106.36.
[552] *Id.* § 106.51.
[553] *Id.* § 106.52.
[554] *Id.* § 106.53.
[555] *Id.* § 106.54.
[556] *Id.* § 106.55.
[557] *Id.* § 106.56.
[558] *Id.* § 106.57.
[559] *Id.* § 106.59.
[560] *Id.* § 106.60.
[561] *Id.* § 106.61.

[562] 34 C.F.R. § 106.3(c)-(d) (1995).
[563] *See* Gary Jackson, Enforcement Director, Seattle Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 14, 1996, pp. 21, 23 (hereafter cited as Jackson interview).
[564] Robert Smallwood, Enforcement Director, Philadelphia Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 11, 1996, p. 10 (hereafter cited as Smallwood interview).
[565] Ibid.
[566] Taylor August, Enforcement Director, Dallas Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 26, 1996, pp.3-4 (hereafter cited as August interview).
[567] *See, e.g.*, Smallwood interview, p. 10.

because now "people do not understand it in the technical, legal, and regulatory terms [necessary] to know that they are being cheated out of a right, because they do not know that they have that right."[568] However, a staff member in the Atlanta Enforcement Office indicated that an argument could be made that the Title VI regulations should not be modified, because their generality gives OCR wider latitude in imposing corrective actions.[569] Thus, it appears that OCR staff would support Title VI regulations that struck a balance between explaining more explicitly the rights and responsibilities under the statute while maintaining OCR's latitude in formulating corrective actions.

Policies

The Department of Education's policies, in conjunction with its regulations, should create a strong foundation for OCR's civil rights compliance program. One of the primary objectives in OCR's Strategic Plan is to have "clearly articulated policy." However, although OCR has developed a number of other documents (investigative guidance and promising practices documents) related to the Commission's issue areas in the past 2 years, OCR has not developed major new policies relating to those areas since adopting the Strategic Plan.[570]

OCR has not defined the phrase equal educational opportunity in any of its policies or guidance memoranda.[571] Moreover, OCR has not provided definitive policy guidance for school districts detailing the various program requirements they must address in ensuring equal educational opportunity for all students. OCR has incorporated some concepts associated with equal educational opportunity, such as parental notification, teacher training, and nondiscriminatory diagnostic procedures, into some of its policies, particularly section 504 policies, but OCR has not incorporated these concepts into policies addressing all of its statutory responsibilities.

OCR takes a more restrained approach to issuing policy for a number of reasons. First, OCR has followed directives of the National Performance Review to issue policies only when necessary. Second, when OCR contemplates issuing new policy, it considers whether it can enforce the law without new policy and whether there is an external need for a policy to empower customers. For example, OCR issued age discrimination regulations because older Americans expressed a need for them for purposes of empowerment. It issued a policy on race-targeted scholarships because of an external need for clarification.[572] It has not issued new policies on *Lau* because there is extensive policy and litigation on those issues and because OCR feels it has handled *Lau* cases efficiently without new policies.[573]

According to Assistant Secretary Cantú, OCR "take[s] the policy process very seriously and tr[ies] to balance [OCR's] agenda."[574] She believes that the issuance of formal policy in the *Federal Register* is not the only way to assist people. For example, she noted that OCR's letters of finding often are used as policy because they are "a clear expression of policy through application to specific facts."[575] Generally, OCR has found that the problem in its work is not the lack of policy; it is the lack of enough resources and staff to enforce the law and policies.[576]

Title VI

The most recent major policy OCR has issued relating to the Commission's issue areas is its 1991 "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP students)."[577] The policy was designed to guide OCR's "*Lau*" compliance reviews, compliance reviews of school districts evaluating their fulfillment of obligations under Title VI as interpreted in *Lau v.*

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[568]George Cole, Special Project Team, Dallas Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 26, 1996, pp. 10-11.

[569]Alice Henry, Regional Issue Coordinator on Ability Grouping and Gifted Programs, Atlanta Enforcement Office, Office for Civil Rights, U.S. Department of Education, June 3, 1996, pp. 10-11.

[570]*See* U.S. Commission on Civil Rights, *Title VI Enforcement*, chap. 5.

[571]In its November 1, 1995, information request to the Office for Civil Rights, the Commission asked OCR for any legal analyses; legal interpretations; policy interpretations, memoranda, or correspondence; congressional testimony; or other documents defining "equal educational opportunity." *See* U.S. Commission on Civil Rights, "Equal Educational Opportunity project Information Request: Office for Civil Rights," Nov. 1, 1995, p. 9, Q. 13. OCR responded that any OCR documents responding to this question, if they exist, would be available on OCR's electronic library. *See* OCR, Information Request Response, enclosure 1, p. 2. The Commission concluded, after a thorough examination of OCR's electronic library, that OCR does not have any documents that define equal educational opportunity.

[572]Cantú interview, p. 3.

[573]Ibid.

[574]Ibid.

[575]Ibid., pp. 3-4.

[576]Ibid., p. 4.

[577]Michael L. Williams, Assistant Secretary, Office for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, Sept. 27, 1991 (hereafter cited as "*Lau* Policy Update").

Nichols.[578] The policy update addressed several issues, including staffing requirements for programs aimed at assisting LEP students, criteria for transferring LEP students from language programs to regular educational programs, the necessity for formal LEP identification and assessment procedures, and issues related to the segregation of LEP students and other students. The policy update clarified that students should not be placed in special education programs based on criteria related only to their limited English proficiency and that LEP students should not be excluded from "gifted and talented" programs.[579] The 1991 policy updated several previous OCR policies relating to students with limited English proficiency. For example, in 1990, the Department of Education reissued a May 1970 memorandum on the identification of discrimination and denial of services on the basis of national origin and a 1985 policy document outlining OCR's compliance procedures for language minority students.[580] To date, OCR has not formalized this policy in regulations open for public comment.

Title IX

OCR has issued no Title IX policies addressing the underrepresentation of female students in advanced mathematics and sciences classes, although it has issued a draft investigative manual that is discussed below.

Section 504

Section 504 is the area in which OCR has been most active in developing internal policy memoranda and external policy clarification letters. Since 1981, OCR has issued numerous policy memoranda and policy letters on various aspects of section 504.[581] Its section 504 policymaking efforts have reflected an active program that has responded to issues arising in the education of students with disabilities, particularly in educational debates and judicial decisions. For example, since the 1980s, a debate among educators has centered on the extent to which schools should assign students with disabilities to regular classes.[582] In 1985, in response to questions about the placement of students with disabilities in regular classes, OCR issued a policy memorandum clarifying that collective bargaining agreements entered into between teachers' unions and school districts are not *per se* violations of section 504 when they contain provisions restricting placement of students with disabilities in regular classes.[583] In March 1988, OCR responded to a then-recent decision of the U.S. Supreme Court decision in *Honig v. Doe*,[584] an

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[578]414 U.S. 563 (1974). In *Lau*, the Supreme Court held that the San Francisco school system's failure to provide English-language instruction or other adequate instructional procedures to students who do not speak English constituted discrimination based on national origin. 414 U.S. at 568-69. Thus, the Department of Education now requires school systems receiving financial assistance to provide programs for students with limited English proficiency.

[579]"*Lau* Policy Update."

[580]William L. Smith, Acting Assistant Secretary, Office for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Office for Civil Rights Policy Regarding the Treatment of National Origin Minority Students Who are Limited-English Proficient," Apr. 6, 1990 (reissuing OCR's Title VI Language Minority Compliance Procedures dated Dec. 3, 1985).

[581]*See* chapter 9.

[582]Two movements have called for fundamental changes in the current special education-regular education system. The first is commonly known as the Regular Education Initiative (REI). REI evolved from a policy initiative by the former Assistant Secretary of the U.S. Department of Education, Madeleine Will, and from the writings of education scholars. Donald D. Hammill, "A Brief Look at the Learning Disabilities Movement in the United States," *Journal of Learning Disabilities*, vol. 26, no. 5 (May 1993), p. 304. *See* Madeleine Will, "Education Children with Learning Problems: A Shared Responsibility," *Exceptional Children*, vol. 52 (February 1986), p. 415; Alan Gartner and Dorothy Kerzner Lipsky, "Beyond Special Education: Toward a Quality System for All Students," *Harvard Educational Review*, vol. 57, no. 4 (November 1987), pp. 367-395; Susan Stainback and William Stainback, "Educating All Students in Regular Education," in Donald S. Marozas and Deborah C. May, *Issues and Practices in Special Education* (New York: Longman, Inc., 1988), pp. 8-10. The second is known as the full inclusion movement. William Stainback and Susan Stainback have described inclusive schooling as "the inclusion of *all* students in the mainstream of regular education classes and school activities with their age peers from the same community. Susan Stainback and William Stainback, "A Rationale for Integration and Restructuring: A Synopsis," in John Wills Lloyd, Nirbhay N. Singh, and Alan c. Repp., eds., *The Regular Education Initiative: Alternative Perspectives on concepts, Issues, and Models* (Sycamore, IL: Sycamore Publishing Co., 1991), p. 225.

The semantical distinction between REI and inclusion may be that while inclusion recognizes the need for continued special educational services and support, REI describes the notion of providing an education tailored to each child's unique needs. In this way, the concepts are, in fact, identical; only the descriptions of the concepts differ. It appears that "REI" was a phrase more commonly used during the 1980s and that inclusion is the term used today. both movements focus on the goal of integrating disabled and nondisabled students, but they are driven by more than the placement of disabled and nondisabled students in the same educational setting.

[583]Harry M. Singleton, Assistant Secretary for Civil Rights, U.S. Department of Education, to Regional Civil Rights Directors, Regions I-X, "Collective Bargaining Agreement Provisions Restricting Placement of Handicapped Children in Regular Classes," June 12, 1985.

[584]484 U.S. 305 (1988).

IDEA case, addressing the suspension of students with disabilities from school for more than 10 days. OCR produced a policy memorandum analyzing that case and its relationship to OCR section 504 policy.[585] OCR issued further policy discussing the application of section 504 to disciplinary suspension and expulsion of students with disabilities[586] as an increasing amount of litigation focused on disciplinary actions taken against students with disabilities.[587] In the 1990s, as questions arose whether attention deficit disorders were disabilities covered under section 504 and the IDEA,[588] OCR issued policy clarification on this issue.[589] As Acquired Immune Deficiency Syndrome (AIDS) became a growing health concern in the United States, OCR provided guidance to its regional offices on the application of the section 504 regulations to children with AIDS in elementary and secondary schools.[590] In addition, as Congress passed the Americans with Disabilities Act of 1990 and made changes to the Rehabilitation Act with the ADA and again in 1992, OCR produced a policy memorandum discussing the changes and clarifying the effects of the ADA and the 1992 amendments on OCR's enforcement of section 504 complaints.[591]

OCR has issued other policy memoranda providing investigative guidance on other issues under section 504. For example, it issued several policies clarifying the distinctions between section 504 and the Education for the Handicapped Act, now the IDEA.[592] It has clarified the section 504 requirements when parents of students with disabilities refuse to consent to a student's initial evaluation.[593] It has offered policy clarifying the

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[585]*See* LeGree S. Daniels, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Analysis of *Honig v. Doe*, 56 U.S.L.W. 4091 (January 20, 1988).

[586]*See* LeGree S. Daniels, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Long-term Suspension or Expulsion of Handicapped Students," Oct. 28, 1988; LeGree S. Daniels, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to Jesse L. High, Regional Civil Rights Director, Office for Civil Rights, Region IV, "Request for Assistance, Muscogee County School District, Georgia," Feb. 24, 1989; William L. Smith, Acting Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Suspension of Handicapped Students—Deciding Whether Misbehavior is Caused By A Child's Handicapping Condition," Nov. 13, 1989.

[587]*See* School Bd. v. Malone, 762 F.2d 1210 (4th Cir. 1985); S-1 v. Turlington, 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981); Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982); Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986), *aff'd as modified sub nom.*, Honig v. Doe, 484 U.S. 305 (1988); Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979); Mrs. A.J. v. Special School Dist., 478 F. Supp. 418 (D. Minn. 1979); Bd. of Trustees v. Doe, 508 So.2d 1081 (Miss. 1987).

[588]*See* U.S. Department of Education, Office for Civil Rights, *National Enforcement Strategy: FYs 1991-1992*, Dec. 11, 1990, p. 3 ("[M]any parents and other interested persons are concerned about students who have been diagnosed as having Attention Deficit Disorder (ADD), and whether it is a handicapping condition under section 504."). *See also* Robert Reid, John W. Maag, and Stanley F. Vasa, "Attention deficit hyperactivity disorder as a disability category: a critique," *Exceptional Children*, vol. 60, no. 3 (December 1993) p. 198.

[589]*See* Robert R. Davila, Assistant Secretary, Office of Special Education and Rehabilitative Services; Michael L. Williams, Assistant Secretary, Office for Civil Rights; and John T. MacDonald, Assistant Secretary, Office of Elementary and Secondary Education; memorandum to Chief State School Officers, "Clarification of Policy to Address the Needs of Children with Attention Deficit Disorders with General and/or Special Education," Sept. 16, 1991; Jeannette J. Lim, Acting Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to Regional Civil Rights Directors, Regions I-X, "Clarification of School Districts' Responsibilities to Evaluate Children with Attention Deficit Disorders (ADD)," Apr. 29, 1993.

[590]*See* William L. Smith, Acting Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, Apr. 5, 1990, Policy Codification Doc. No. 223.

[591]*See* Richard D. Komer, Deputy Assistant Secretary, Office for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Changes made by the Americans with Disabilities Act to the Definition of Handicapped Person under the Rehabilitation Act," Jan. 28, 1991, Policy Codification Document No. 00242; Richard D. Komer, Deputy Assistant Secretary, Office for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Changes made by the 1992 Amendments to the Rehabilitation Act of 1973," Jan. 11, 1993.

[592]*See* Terence J. Pell, Acting Deputy Assistant Secretary for Policy, memorandum to OCR Senior Staff, "Section 504 Complaints Against State Education Agencies Alleging Incomplete or Incorrect Monitoring or Complaint Handling," Oct. 26, 1987, Policy Codification Document No. 00157; LeGree S. Daniels, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Guidance Concerning Distinctions Between Section 504 and the Education of the Handicapped Act."
Oct. 24, 1988.

[593]*See* Richard D. Komer, Deputy Assistant Secretary, Office for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Initiation of due process hearing when parent refuses consent for an initial evaluation," May 29, 1992, Policy Codification Document No. 00263; Richard D. Komer, Deputy Assistant Secretary, Office for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Initiation of Due Process Hearing When Parent Refuses Consent for an Initial Placement," Oct. 21, 1992, Policy Codification Document No. 00255.

section 504 definition of handicap,[594] and the jurisdiction over elementary and secondary education free appropriate public education complaints in which a child's status as a handicapped person is at issue.[595]

OCR also has provided policy guidance to regional offices on cases or issues as those offices have requested it.[596] In addition to these internal policy memoranda, OCR had produced numerous letters over the past 15 years clarifying its policy under section 504.[597] Although the letters generally have functioned to provide technical assistance to schools and individuals throughout the country, some are maintained in OCR's policy codification system as well.[598]

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[594]*See* Richard D. Komer, Deputy Assistant Secretary, Office for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Clarification of 'record of' and 'regarded as' in the Definition of Handicap under Section 504," Aug. 3, 1992.

[595]*See* Richard D. Komer, Deputy Assistant Secretary, Office for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Jurisdiction over Elementary and Secondary Education Free Appropriate Public Education Complaints in which a Child's Status as a Handicapped Person Is at Issue—Recision of October 14, 1987, Memorandum," May 13, 1995, Policy Codification Document No. 00243.

[596]*See* Harry M. Singleton, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to William H. Thomas, Regional Civil Rights Director, Region IV, "Region IV Request for Policy Determination on the Effect of Smith v. Robinson, 104 S.Ct. 3457 (1984), on OCR's §504 Jurisdiction, Apr. 4, 1985, Policy Codification Document No. 00050; Harry M. Singleton, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to Jesse L. High, Regional Civil Rights Director, Region VII, "Request for Policy Guidance, OCR Case No. 07-85-1094, Missouri Department of Elementary and Secondary Education, and Case Nos. 07-85-1070 through 07-85-1093, Special School District of St. Louis County and the 23 Local Education Agencies It Services," Dec. 13, 1985, Policy Codification Doc. No. 00025; Alicia Coro, Acting Assistant Secretary for Civil Rights, memorandum to Robert A. Smallwood, Regional Civil Rights Director, Region III, "Jurisdiction over Pennsylvania Intermediate Units, Local School Districts and the Pennsylvania Department of Education," Jan. 13, 1987, Policy Codification Document No. 00032; LeGree S. Daniels, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to Gilbert D. Roman, Regional Civil Rights Director, Region VIII, "Request for Policy Clarification, Ogden City School District, OCR Case No. 08-87-1003, and Utah State Office of Education, OCR Case No. 08-87-4001, Oct. 26, 1987, Policy Codification Document No. 00150; Terence J. Pell, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights, U.S. Department of Education, memorandum to Thomas E. Esterly, Acting Regional Civil Rights Director, Region VII, "Your Request for Policy Guidance—Missouri Special School Districts," Oct. 26, 1987, Policy Codification Document No. 00031; William L. Smith, Acting Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to Gary D. Jackson, Regional civil Rights Director, Region X, "Request for Policy Guidance—Vancouver School District, OCR Case No. 10-88-1008, June 28, 1989, Policy Codification Document No. 170; Jeannette J. Lim, Acting Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to John E. Palomino, Regional Civil Rights Director, Region IX, "Policy Clarification on 'Significant Assistance' Jurisdiction—Docket Number 09-91-1240," Mar. 22, 1993, Policy Codification Document No. 00268.

[597]*See* Jesse L. High, Regional Director, Office for Civil Rights, Region VII, U.S. Department of Education, to Harry J. Bahr, Director of Special Education, Special School District of St. Louis County, Town and Country, MO, Jan. 31, 1986, 305 EHLR 30 (clarifying OCR's policy on granting of credit to and graduation requirements for handicapped students); Judith E. Banks, Acting Regional Director, Office for Civil Rights, Region VII, U.S. Department of Education, to Woody Houseman, Ph.D., Education Program Specialist for Gifted/Talented/Creative and Homebound/Hospital Programs, Kansas State Department of Education, Topeka, KS, Mar. 4, 1986, 305 EHLR 34 (clarifying the similarities and differences between the evaluation requirements of the section 504 and EHA regulations); Harry A. Oris, Director, Elementary and Secondary Education Division, Office for Civil Rights (Cleveland), U.S. Department of Education, to Jan Dolittle, Consultant, Pupil Personnel, Oakland Schools, Pontiac, MI, Oct. 17, 1988, 305 EHLR 49; LeGree S. Daniels, Assistant Secretary for Civil Rights, U.S. Department of Education, to Gary M. Clark, Ed.D., Professor, National Study of High School Programs for Handicapped Youth, University of Kansas, Nov. 3, 1988; Richard D. Komer, Deputy Assistant Secretary for Policy, Office for Civil Rights, U.S. Department of Education, to Perry A. Zirkel, University of Professor of Education and Law, Lehigh University, Bethlehem, PA, June 8, 1990; Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Department of Education, letter to Colleague, Apr. 29, 1992; Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Department of Education, to Leona C. Gruzynski, Ph.D, Director of Pupil Services, Baltimore County Public Schools, May 21, 1991, Policy Codification Document No. 00008; Norma Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, to Dale Mentink, Staff Attorney, Protection and Advocacy Incorporated, Nov. 3, 1988, Policy Codification Doc. No. 165; Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, to Prof. Perry A. Zirkel, Lehigh University, College of Education, Bethlehem, PA, Aug. 28, 1993; Sheralyn S. Goldbecker, Attorney-Advisor, Office for Civil Rights, Elementary and Secondary Policy Division, U.S. Department of Education, Mar. 3, 1994.

[598]*See* LeGree S. Daniels, Assistant Secretary for Civil Rights, U.S. Department of Education, to Gary M. Clark, Ed.D., Professor, National Study of High School Programs for Handicapped Youth, The University of Kansas, Nov. 3, 1988, Policy Codification Document No. 00165; Legree S. Daniels, Assistant Secretary for Civil Rights, U.S. Department of Education, to Paulette J. Thomas, Ph.D., Assistant Superintendent, Office of Special Educational Services, Louisiana State Department of Education, Baton Rouge, LA, Feb. 21, 1989, Policy Codification Document No. 00139; LeGree S. Daniels, Assistant Secretary for Civil Rights, U.S. Department of

Investigative Guidance, Model Investigative Plans, Procedures, Handbooks, and Manuals

OCR has developed a number of investigative guidance documents, procedures, handbooks, and other documents that help applicants, recipients, beneficiaries, and the public in understanding and complying with civil rights requirements and that provide systematic guidance to assist OCR staff in their investigations. Providing such guidance relative to OCR's high-priority issue areas has been a major focus of OCR's activities in recent years. It has been OCR's means of resolving internal differences among the regions. If OCR's regional offices confront difficulties in resolving a case because of different approaches among the regions, OCR will issue investigative guidance to clarify the issue.[599] OCR has begun to share its investigative guidance with the public so that they are more informed of OCR's "rules" and requirements.[600]

Special Education

In 1981 OCR issued a handbook on the enforcement of section 504.[601] The purpose of the handbook was to "bring together, into a single document, an analysis of the legislation, the accompanying regulations and other relevant information regarding Section 504." The handbook synthesizes the information contained in a variety of earlier documents, such as policy interpretations, decision announcements, procedural announcements, letters of finding, policy memoranda, digests, correspondence, and Department of Justice briefs.[602]

In addition to the section 504 handbook, OCR more recently has produced a manual on section 504 and Title II of the Americans with Disabilities Act.[603] The manual provides guidance to OCR investigators on various issues. For example, it outlines the statutory provisions of section 504 and Title II of the ADA, the legislative histories of these statutes, the regulations and regulation histories, and Executive orders related to these statutes. The manual presents the theories of discrimination, including elements and burdens of proof, under section 504 and Title II of the ADA, and the relationship of these laws to the IDEA and other laws. The manual also discusses issues, such as jurisdiction, scope, remedies, voluntary action, notice, recordkeeping, administrative requirements, grievance procedures, self-evaluations, methods of enforcement, attorneys' frees, and *pro se* cases, relating to section 504 and Title II of the ADA. The manual also offers guidance by topics. Topics covered that relate to elementary and secondary education include location and notification of students with disabilities, free appropriate public education, evaluation and reevaluation, placement, procedural safeguards, least restrictive environment, discipline, nonacademic services, preschool, latchkey programs, graduation, attention deficit disorder, awards and honors, students with both limited English proficiency and disabilities, magnet schools, and choice.[604] The documentation provided under most of the topics lists (1) the statutory and regulatory provisions that address the topic; (2) OCR policy documents related to the topic; (3) other OCR materials or sources relating to the topic; (4) contacts who can provide more information on the topic; (5) relevant caselaw; and (6) case letters.[605]

Education, to Jim L. Newby, State Director of Special Education, State of New Mexico, Santa Fe, NM, Mar. 23, 1989, Policy Codification Document No. 169; Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Department of Education, to Thad Cochran, U.S. Senate, re: Mississippi Department of Education, OCR Case Number 04-91-1092, Apr. 12, 1991, Policy Codification Document No. 00246; Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Department of Education, to Lloyd Bentsen, U.S. Senate, Jan. 29, 1992, Policy Codification Document No. 00216; Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Department of Education, letter to Colleague, Apr. 29, 1992; Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Department of Education, to Leona C. Gruzynski, Ph.D, Director of Pupil Services, Baltimore County Public Schools, May 21, 1991, Policy Codification Document No. 00008; Richard D. Komer, Deputy Assistant Secretary for Policy, Office for Civil Rights, U.S. Department of Education, to Patricia L. Howey, Special Education Consulting, West Point, IN, July 5, 1995, Policy Codification Document No. 00011; Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, to Dale Mentink, Staff Attorney, Protection and Advocacy Inc., Nov. 3, 1988, Policy Codification Doc. No. 165; Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, to Prof. Perry A. Zirkel, Lehigh University, College of Education, Bethlehem, PA, Aug. 28, 1993.

[599]Cantú interview, p. 4.

[600]Ibid., p.4.

[601]Office for Civil Rights, U.S. Department of Education, "OCR Handbook for the Implementation of Section 504 of the Rehabilitation Act of 1973," prepared by CRC Education & Human Development, Inc., April 1991.

[602]Ibid., pp. 1-3.

[603]U.S. Department of Education, Office for Civil Rights, *Section 504 and Americans with Disabilities Act (ADA) Title II Manual* (selected excerpts as retrieved from OCR's electronic library) (file names: HQ960401.pdc; HQ963515.rgc; HQ964544.rgc; HQ964549.rgc; HQ962516.rgc; HQ963522.rgc; HQ963541.rgc; HQ963545.rgc; HQ963626.rgc; HQ963627.rgc).

[604]U.S. Department of Education, Office for Civil Rights, *Section 504 and Americans with Disabilities Act (ADA) Title II Manual* (selected excerpt as retrieved from OCR's electronic library) (file name: HQ960401.pdc—"Table of Sections").

[605]U.S. Department of Education, Office for Civil Rights, *Section 504 and Americans with Disabilities Act (ADA) Title II Manual*

The material provides investigators with a wealth of information and sources on the specific topic.

Overrepresentation of Minorities in Special Education

In the past several years, OCR has produced a number of documents to assist investigations in the area of overrepresentation of minorities in special education. In 1994 OCR issued an "Investigator's Guide" laying out statistical and analytic investigative procedures to be used when objective statistical techniques are required in a case related to overrepresentation of minorities in special education.[606] The guide discusses the analytic context, data issues, methodology, and statistical tests.[607] It also provides data sheets with instructions as a way to organize and record data needed for a thorough statistical and analytical investigation.[608]

In July 1995, Assistant Secretary Cantú circulated three documents to all OCR staff to provide them with information on the issues surrounding overrepresentation of minority students in special education. The documents were prepared by a team drawn from all of OCR, as well as representatives from the Office of the General Counsel and the Office of Special Education and Rehabilitative Services. The documents included an analysis of the legal approaches to minorities and special education, a history and summary of related civil rights issues, and an indepth analysis of the issue.[609]

OCR's expert team on overrepresentation of minority students in special education and low track courses also prepared a report that provides guidance in a number of different areas.[610] The report discusses the legal basis for using disparate impact theory in investigations relating to the overrepresentation of minority students in special education, explains why investigators should focus on referral decisions, gives reasons why investigators should require recipients to show that their special education placements result in "positive outcomes" for students, provides a "decision-tree" for investigators, and includes a sample investigative plan for investigations related to referral and benefit issues.[611] This report was instrumental in OCR's development of the policy guidance issued in 1995.

In addition to these materials, OCR has two major resource guidance materials on overrepresentation of minority students in special education. In OCR's Title VI manual, which is similar to the manual created for section 504 and Title II of the ADA, OCR has included the topic of overrepresentation of minorities in special education. The section discussing this topic lists the statutes and regulations related to overrepresentation of minority students in special education. It lists materials produced by OCR, other DOEd offices, and the U.S. Department of Justice related to the topic, such as OCR's policy memoranda and manuals, decisions of the Secretary of DOEd and the Civil Rights Reviewing Authority, statistical reports, contracted reports, and legal memoranda. It also lists numerous education articles and reports that address overrepresentation of minority students in special education. Like the section 504/Title II manual, the Title VI manual provides a summary of caselaw and OCR case letters that relate to overrepresentation of minority students in special education.[612]

OCR also has made available to its investigators a report prepared for the Office of Special Education Programs by Project FORUM at the National Association of State Directors of Special Education. The report discusses in detail a variety of issues relating to the overrepresentation of minority students in special education. For example, it defines terminology associated with the topic, such as "disproportionate representation," "term minority," and "within-group variability in minority classifications." It presents a national picture of minority students in the United States. It provides a background on the litigation that has occurred relating to the overrepresentation of minority students in special education. It also discusses explanations for the disproportionate representation,

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(selected excerpts as retrieved from OCR's electronic library) (file names: HQ963515.rgc; HQ964544.rgc; HQ964549.rgc; HQ962516.rgc; HQ963522.rgc; HQ963541.rgc; HQ963545.rgc; HQ963626.rgc; HQ963627.rgc).

[606]U.S. Department of Education, Office for Civil Rights, "Statistical/Analytic Investigative Procedures Over-Representation of Minorities in Special Education Placement. Investigator's Guide," April 1994, submitted as part of DOEd/OCR/Philadelphia response to USCCR's June 6, 1996 letter.

[607]Ibid., pp. 1-17.

[608]Ibid., pp. 18-23.

[609]Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to All Staff, "Minority Students and Special Education," July 6, 1996.

[610]U.S. Department of Education, Office for Civil Rights, "Report of the Expert Team on Overrepresentation of Minority Students in Special Education and Low Track Courses" (no date), submitted as part of DOEd/OCR/Philadelphia Response to USCCR's June 6, 1996, letter.

[611]Ibid.

[612]U.S. Department of Education, Office for Civil Rights, *Title VI Manual* (selected excerpt as retrieved from OCR's electronic library) (file name: HQ963626.rgc—Section 626—Minority Students in Special Education).

such as the characteristics of disabilities and problems in determining whether a minority student has a disability, biases in the assessment process, quality of instruction provided to minority students, the characteristics of students' homes and communities, the broader historical and cultural contexts, and the legal and administrative influences that perpetuate overrepresentation of minority students in special education.[613] Both of these resource materials, the Title VI manual and the Project FORUM report, are extremely useful in providing OCR investigators and the public with an understanding of the background and issues surrounding the topic of overrepresentation of minority students in special education.

Ability Grouping and Tracking

OCR has not issued updated investigative guidance on ability grouping and tracking since 1991, when Deputy Assistant Secretary Komer disseminated draft guidance on ability grouping to OCR staff.[614] The draft guidance discusses legal standards based on caselaw for finding violations of Title VI in the area of ability grouping. It cites the Supreme Court case, *Wards Cove Packing Company v. Atonio*,[615] as an authority on standards of proof in disparate impact cases under Title VI. Since the guidance predates the Civil Rights Act of 1991, which was intended, in part, to reverse the effects of the *Wards Cove* decision, the guidance is outdated. The guidance also includes a model investigative plan, which describes the steps OCR staff should take in investigating ability grouping cases at the elementary school level.[616]

Limited English Proficiency

In 1985 and 1987, OCR issued, at the headquarters level, investigative guidance relating to students with limited English proficiency. The 1985 guidance contains OCR's "Title VI Minority Language Compliance Procedures," outlining OCR's current operating procedures for conducting investigations of districts enrolling students with limited English proficiency.[617] The 1987 guidance provides a copy of an investigative plan on Title VI *Lau* reviews which headquarters offered as a guide to all regional offices in preparing *Lau* reviews.[618] Beyond these headquarters documents, OCR regional offices have created model plans and guidance to assist schools that serve students with limited English proficiency in developing Title VI *Lau* plans and to assist OCR investigators in conducting *Lau* compliance reviews.[619]

In addition to these materials, OCR has devoted sections of its section 504/Title II and Title VI manuals to issues relating to students with limited English proficiency. The section on treatment of limited-English-proficient students in the Title VI manual summarizes OCR's current policy on the provision of equal educational opportunity, under Title VI, for national origin minority group students who are limited English proficient. It lists the statutes, regulations, and Executive orders related to the topic, as well as OCR's policies, training materials, and other related documents on the topic. Like the section in the Title VI manual on minority students in special education, the section on limited-English-proficient students lists education articles and reports. These articles and reports cover a broad range of topics, such as historical background,

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[613]Beth Harry, Ph.D, Assistant Professor, University of Maryland, College Park, "The Disproportionate Representation of Minority Students in Special Education: Theories and Recommendations," Final Report, August 1, 1994.

[614]Richer D. Komer, Deputy Assistant Secretary for Policy, Office for Civil Rights, U.S. Department of Education, memorandum to OCR Regional Civil Rights Directors, Regions I-X, "Ability Grouping Investigative Procedures Guidance," Mar. 14, 1991, submitted following USCCR's onsite visit to DOEd/OCR/Atlanta, June 1995 (hereafter cited as OCR, "Ability Grouping Investigative Guidance").

[615]109 S. Ct. 2115 (1989).

[616]OCR, "Ability Grouping Investigative Guidance," appendix. However, OCR's practice is to interpret the guidance in light of superseding legal developments, consistent with the Civil Rights Act of 1991. For example, in describing the establishment of a prima facie case, the guidance refers to the Court's decision requiring Title VII complainants to isolate the particular factors that have caused the disparate impact. (OCR, "Ability Grouping Investigative Procedures Guidance," p.3.) This discussion fails to acknowledge the exception to the "particularity requirement" created by the Civil Rights Act of 1991. 42 U.S.C. Section 2000e-2(k)(1)(B)(1) (Supp. V. 1993). *See* David A. Cathcart, *The Civil Rights Act of 1991* (Philadelphia: American Law Institute-American Bar Association, 1993), pp. 22-25. However, OCR interprets the current guidance consistent with the act, including the particularity requirement.

[617]*See* Harry M. Singleton, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Department of Education, memorandum to Regional Civil Rights Director, Regions I-X, "Attachment to Model Letter to School District with Approved *Lau* Plans," Dec. 3, 1985.

[618]*See* Alicia Coro, Acting Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Department of Education, memorandum to Regional Civil Rights Directors, Region I-X, "Investigative Plan for Title VI *Lau* Reviews," Feb. 26, 1987.

[619]U.S. Department of Education, Office for Civil Rights, Region IV, model plan outline (unofficial) (received from OCR Region IV office during onsite visit, June 4, 1996); U.S. Department of Education, Office for Civil Rights, Region VII, investigative guidance (received from OCR Region VII during 2nd Annual Civil Rights Summit in Kansas City, Missouri, Summer 1995).

teaching strategies, language development, testing and evaluation methods, research studies, and educational debates. This section of the Title VI manual also describes the functions and services of the National Clearinghouse for Bilingual Education to offer readers more sources of information on limited-English-proficient students. The section ends with a summary of caselaw on the requirements for educating students with limited English proficiency and OCR's case letters related to this topic.[620]

Access of Females and Minorities to High Level Mathematics and Science Courses

In August 1994, OCR released a draft Investigative Manual on "Underrepresentation of Females and Minorities in Upper-Level Mathematics and Science in Secondary Schools,"[621] which was prepared by a team of OCR staff members with expertise in the area drawn from throughout OCR. The draft manual provides comprehensive guidance to investigators conducting compliance reviews on the underrepresentation of females and minorities in higher level mathematics and science courses (hereafter referred to as mathematics and science compliance reviews). Although it recognizes that "developing sound investigative approaches to the issue presents a daunting challenge," the investigative manual provides "step-by-step guidance" on how to target recipients for compliance reviews, investigative approaches to use, and the legal standards that apply.[622] The manual recommends that all mathematics and science compliance reviews look at school districts' student placement and school districts' counseling and guidance.[623] It also provides guidance for compliance reviews that look at the access of students with limited English proficiency to higher level mathematics and science courses and differences across schools within a district that have an adverse impact on minorities' access to higher level mathematics and science courses.[624] In each of these areas, the manual discusses the types of information and analysis necessary to make a case of discrimination based on disparate impact, as well has to make a case of discrimination based on disparate treatment.[625] Appendices to the manual provide guidance on the types of data investigators will need to collect during the course of mathematics and science compliance reviews[626] and possible remedial steps to be taken by districts found in noncompliance.[627]

In addition to this manual, OCR has developed a Title IX manual, similar to its manuals on section 504/Title II and Title VI.[628] The Title IX manual includes a section on Title IX and separate schools and separate classes,[629] and a section on Title IX and math, science, and high-track courses.[630] These sections provide a background discussion on the respective topics. They list the Federal statutes and regulations, OCR's policies and other documents, and references to articles, studies, or reports relating to the topic. In addition, the sections summarize caselaw and OCR's case letters related to the topic.[631]

Testing

OCR has disseminated draft investigative guidance on fairness in testing,[632] an issue that cuts across all of the Commission's issue areas. However, the guidance only addresses Title VI and Title IX, not section 504.[633] The guidance was prepared to:

> provide [OCR] attorneys and investigators with a single, comprehensive statement of the testing and assessment

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[620]*See* U.S. Department of Education, Office for Civil Rights, *Title VI Manual* (selected excerpt as retrieved from OCR's electronic library) (Section 625—Treatment of Limited-English Proficient Students).

[621]Office for Civil Rights, U.S. Department of Education, Draft, "Investigative Manual: Underrepresentation of Females and Minorities in Upper-Level Mathematics and Science in Secondary Schools," August 1994, prepared by Expert Team on Underrepresentation of Women and Minorities in Mathematics, Science, and Other High Track Courses (hereafter cited as OCR, "Investigative Guidance on Females and Minorities in Math and Science").

[622]Ibid., p. 1.

[623]Ibid., p. 2.

[624]Ibid.

[625]*See* ibid, pp. 4-9.

[626]Ibid, app. A, "Sample Data Needs."

[627]Ibid., app. B, "Sample Assurances."

[628]*See* U.S. Department of Education, Office for Civil Rights, *Title IX Manual* (selected excerpts as retrieved from OCR's electronic library) (file name: HQ960401.pdc).

[629]*See* U.S. Department of Education, Office for Civil Rights, *Title IX Manual* (selected excerpt as retrieved from OCR's electronic library) (Section 933—Title IX—Separate Schools, Classes, Transportation, Special Purpose Schools).

[630]*See* U.S. Department of Education, Office for Civil Rights, *Title IX Manual* (selected excerpt as retrieved from OCR's electronic library) (Section 935—Math/Science/High Track Courses).

[631]*See* U.S. Department of Education, Office for Civil Rights, *Title IX Manual* (selected excerpts as retrieved from OCR's electronic library) (Section 933—Title IX—Separate Schools, Classes, Transportation, Special Purpose Schools; Section 935—Math/Science/High Track Courses).

[632]Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to OCR Staff, "Fairness in Testing," draft, Mar. 14, 1995 (hereafter cited as OCR, "Testing Guidance").

[633]Ibid., p. 2.

principles that lie at the core of Title VI and Title IX case law and to inform recipients of the standards by which their compliance with Title VI and Title IX may be evaluated, and. . .encourage voluntary compliance with a clearly articulated outline of the testing and assessment parameters that guide OCR investigations.[634]

The guidance provides an overview of the legal approaches and theories that can be used in OCR's testing investigations.[635] It also contains a list of legal and technical resources that regional enforcement staff can use as resources. It outlines the steps for establishing disparate impact[636] and provides draft questions for evaluating evidence of educational necessity.[637]

In addition to this draft investigative guidance, OCR has created sections in the Title VI and Title IX manuals on testing.[638] The section in OCR's Title VI manual addresses several subtopics: alternatives to standardized tests, testing for admission purposes, test validity and reliability, I.Q. tests, and use of tests.[639] Like the draft investigative guidance, however, OCR has not included in the section 504/Title II manual a discussion on testing in elementary and secondary education, although the manual does have a section on evaluations and reevaluations.[640]

Promising Practices and Models that Work

In fulfillment of the aim of OCR's Strategic Plan to develop "strong remedial models" and disseminate "models that work," over the past year, OCR has adopted the innovative practice of putting together issue area teams to research and develop "promising programs and practices" documents in its high-priority areas. The promising practices documents generally are prepared by teams of issue-area experts assembled by OCR's headquarters office, which then sends the documents to the regional enforcement offices.[641]

The promising practices documents describe educationally valid models that have been implemented in school districts across the country and promote equal educational opportunity in the issue areas. However, OCR does not make determinations on educational validity because it does not consider itself an expert on education issues.[642] Instead, OCR relies on external education experts and consultants for information on the validity of educational practices.

OCR's promising practices documents are designed for school districts as part of OCR's technical assistance efforts as well as for OCR staff to use as guides in developing remedial plans for school districts that are not in compliance with civil rights statutes. Promising practices or models that work are useful ways for OCR to provide districts with information on educationally sound programs and what it takes to implement them.[643]

In March 1996, OCR released a promising practices document relating to equal educational opportunity for students with limited English proficiency.[644] The document describes a number of educational programs that may help schools ensure effective participation by limited-English-proficient students in their regular education programs. For each education program, the document indicates the targeted population, provides a brief summary description, offers evidence of the program's success, and gives the names of contact persons familiar with the program.[645]

In April 1996, OCR released a promising practices document on "Access for Women and Minorities to Mathematics and Science Programs and Gifted and Talented Education Programs."[646] The document emphasizes that it is "primarily intended to be a starting point to help districts with an underrepresentation problem see what has been done and what can be done

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[634]Ibid., p. 2.
[635]Ibid., pp. 2-14.
[636]Ibid., app. A.
[637]Ibid., app. B.
[638]*See* U.S. Department of Education, Office for Civil Rights, *Title VI Manual* and *Title IX Manual* (selected excerpt as retrieved from OCR's electronic library) (file name: HQ960401.pdc).
[639]*See* U.S. Department of Education, Office for Civil Rights, *Title VI Manual* (selected excerpt as retrieved from OCR's electronic library) (file name: HQ960401.pdc, outlining section 628—Testing).
[640]*See* U.S. Department of Education, Office for Civil Rights, *Section 504 and Americans with Disabilities Act (ADA) Title II Manual* (selected excerpt as retrieved from OCR's electronic library) (file name: HQ960401.pdc).
[641]*See* Lee Nell, Chief Regional Attorney, Philadelphia Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, p. 19 (hereafter cited as Nell interview).
[642]*See* Cantú interview, p. 6.
[643]Cathy Lewis, Acting Senior Enforcement Director, Western Part of the United States, Office for Civil Rights, U.S. Department of Education, interview in Washington, D.C., June 13, 1996, p. 5 (hereafter cited as Lewis interview).
[644]Office for Civil Rights, U.S. Department of Education, *Promising Practices and Programs for Serving National Origin Limited English Proficient Students*, prepared by *Lau* Team, March 1996, submitted as part of DOEd/OCR/Philadelphia response to USCCR June 6, 1996 letter (hereafter cited as OCR, *Lau Promising Practices*).
[645]Ibid.
[646]Office for Civil Rights, U.S. Department of Education, *Promising Programs and Practices: Access for Women and Minorities to Mathematics and Science Programs and Gifted and Talented Education Programs*, April 1996, submitted as part of DOEd/OCR/Dallas response to USCCR June 6, 1996, letter (hereafter cited as OCR, *Promising Practices for Math and Science and Gifted and Talented Programs*).

and to give them potential contacts to explore appropriate strategies."[647] Like the promising practices document for limited-English-proficient students, the document identifies the promising programs' target groups and goals, provides brief descriptions of promising programs, gives evidence of success, and identifies contact persons.[648] In preparing this document and in ongoing work in the area of underrepresentation of women and minorities in higher level mathematics and science courses, OCR has worked with the Office of Educational Research and Improvement's Eisenhower Mathematics Consortium, which has expertise on new and nontraditional techniques for teaching mathematics and science so as to reach students who traditionally have not participated in higher level courses in these subjects.[649]

OCR also has teams working on promising practices documents in the areas of ability grouping[650] and overrepresentation of minorities in special education.[651] OCR is participating in Project FORUM, a project funded by the Office of Special Education Programs and operated under the auspices of the National Association of State Directors of Special Education. The project is designed to develop promising practices to reduce the number of minority children referred for special education.[652] According to Jean Peelen, Enforcement Director of the Washington, D.C., Metro Enforcement Office, OCR expects to release a "resource guide" that will describe some promising in this area and identify educational experts on various alternative strategies in June 1996.[653]

Policy Dissemination and Electronic Policy Databases

An effective way to promote compliance with civil rights laws is through dissemination of, and education on, the criteria considered by OCR in an investigation or compliance review. Recipients who understand the actions that constitute discrimination and OCR's criteria for civil rights compliance will be better informed to ensure that their programs comply with civil rights laws. Recognizing the importance of this information, OCR has begun to share its investigative guidance with the public so that they may be knowledgeable about OCR's rules and requirements. OCR has shared this guidance when conducting complaint investigations and compliance reviews and when providing technical assistance. OCR also has collected its policies and resource guidance materials into its electronic library. As a result, OCR's policies, resource materials, education and technical assistance documents, and other information are easily accessible through a single computerized database. This database, however, is not currently accessible to the public.

OCR's Civil Rights Compliance and Enforcement Process

Policy Development

Under the reorganization, policy development primarily is the responsibility of the Program Legal Team in OCR's headquarters office.[654] However, the Program Legal Team can call upon other OCR staff, including regional staff, in developing policy. Once the Assistant Secretary's Council determines the need for policy, one of the teams in the Program Legal unit, the one assigned to the relevant issue area, coordinates the development of that policy. However, the team actually working on the policy is drawn from throughout OCR and sometimes even from outside of OCR.[655] For instance, in 1994 a team of staff from OCR's headquarters, regional office staff, and education experts worked together to develop a "talking vehicle" on special education policy, and another team developed an OCR policy on "Minority Students in Special Education."[656] Depending on who has the most expertise in the area, the senior person on the policy team may not be a staff member from the Program Legal Team. OCR has designated issue area specialists who are responsible for becoming experts in a particular area and may be consulted in policy development.[657]

OCR has ongoing informal issue teams working in a number of high-priority issue areas. These teams have responsibility, not only for policy development, but also for serving as inhouse experts for OCR staff. For instance, the Department of Education has created a *Lau* team to assist in cases that raise second-generation *Lau* issues, such as identification of LEP students, testing of

[647]Ibid., p. 1.
[648]Ibid.
[649]Sherry Goldbecker, Issue Coordinator for Mathematics and Science, Office for Civil Rights, U.S. Department of Education, interview in Washington, D.C., May 30, 1996, p. 4 (hereafter cited as Goldbecker interview).
[650]*See* Barbra Shannon, Chief Regional Attorney, Atlanta Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 3, 1996, p. 8 (hereafter cited as Shannon interview).
[651]Jean Peelen, Enforcement Director, D.C. Metro Office, Office for Civil Rights, U.S. Department of Education, interview in Washington, D.C., May 28, 1996, pp. 2, 6 (hereafter cited as Peelen interview).
[652]Ibid., p. 2.
[653]Ibid., p. 6.
[654]Office for Civil Rights, U.S. Department of Education, "Headquarters Proposed Functional Statement" (no date), p. 7.
[655]Ganson interview, p. 3.
[656]Peelen interview, p. 2.
[657]Ganson interview, p. 3.

LEP students, and opportunities for LEP students in gifted and talented programs.[658]

Complaint Processing and Compliance Reviews

Under the reorganization, responsibility for processing complaints of discrimination and conducting compliance reviews, from beginning to end, lies with the enforcement divisions.[659] An enforcement division may seek assistance from throughout OCR, and it may request that the Program Legal Unit assist with research, but the ultimate responsibility for ensuring that cases are "handled with excellence" belongs to the enforcement division.[660] OCR's headquarters is involved in complaints only if the enforcement office wishes to proceed with enforcement. The headquarters office approves the enforcement office's annual enforcement dockets (discussed above) and receives copies of compliance review resolution letters and resolution agreements, but does not get actively involved in most compliance reviews.[661]

Case Resolution Manual

OCR enforcement office staff process complaints using the procedures outlined in OCR's Case Resolution Manual, which was issued in 1994.[662] In furtherance of OCR's Strategic Plan, the Case Resolution Manual emphasizes "prompt and appropriate" resolution of cases.[663] The Case Resolution Manual is used for compliance reviews as well as complaints.

Under the Case Resolution Manual, when a complaint is received by OCR, staff are instructed to acknowledge the receipt and to take prompt steps to obtain enough information to "evaluate" the complaint, which means to determine whether OCR should proceed with complaint resolution. Evaluating a complaint includes ascertaining whether OCR has jurisdiction over the complaint, whether the complaint is timely, or whether there is some other reason why OCR should not attempt to resolve the complaint.[664]

If staff determine that OCR should attempt to resolve the complaint, the Complaint Resolution Manual instructs staff to engage in "case planning," using a team approach involving investigators, attorneys, and team leaders. The manual does not require a written investigative plan, but does require a written explanation of the specific allegations to be resolved and the expected time frames for resolving them.[665] The manual provides staff with several means of resolving complaints, including "early complaint resolution," in which OCR staff act as mediators who facilitate an agreement between the complainant and the recipient. Early complaint resolution is possible at any time during the complaint process.

Before the issuance of the Case Resolution Manual, OCR processed complaints following the procedures contained in an Investigation Procedures Manual issued in 1990.[666] The Investigation Procedures Manual was a prescriptive document. Under the Investigative Procedures Manual, virtually every case was handled in exactly the same way.[667] The manual required that an investigative plan and an investigative report be prepared for each complaint investigation, and it required that a letter of finding be issued whenever OCR reached a finding of compliance or noncompliance.[668] It provided for several levels of review for each of these documents.[669] Before letters of finding were approved and signed by the Regional Director, they were altered and reviewed by the investigator, the branch chief, an attorney, the division director, the chief attorney, and the deputy regional director.[670] Although the Investigation Procedures Manual provided for early complaint resolution, OCR staff was not to attempt early complaint resolution without written consent from both parties to the complaint, and early complaint resolution only was available before an OCR investigation began.[671]

The Case Resolution Manual has made a major improvement in the way OCR handles complaints.[672] The new procedures give staff the flexibility to do what is necessary to resolve each complaint. If at any point the case can be resolved, the complaint resolution team has

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[658]Lewis interview, p. 4; Lim and Bowers September 1994 interview, p. 2.

[659]Ganson interview, p. 2.

[660]Ibid.

[661]Helen Whitney, Enforcement Director, New York Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, p. 5 (hereafter cited as Whitney interview).

[662]Office for Civil Rights, *Case Resolution Manual*, Nov. 15, 1994 (hereafter cited as OCR, *Case Resolution Manual*).

[663]Ibid., p. 8.

[664]Ibid., pp. 3-7.

[665]OCR, *Case Resolution Manual*, p. 9.

[666]U.S. Department of Education, Office for Civil Rights, *Investigation Procedures Manual*, issued by William L. Smith, Acting Assistant Secretary for Civil Rights, May 23, 1990 (hereafter cited as OCR, *Investigation Procedures Manual*).

[667]Linda McGovern, Enforcement Coordinator, Division C, and Enforcement Director, Chicago Enforcement Office, interview in Washington, D.C., June 26, 1996, p. 2 (hereafter cited as McGovern interview).

[668]*OCR, Investigation Procedures Manual*, pp. 19, 27, 29.

[669]Ibid.

[670]McGovern interview, p. 2.

[671]*OCR, Investigation Procedures Manual*, pp. 16-17; *see also* McGovern interview, p. 2.

[672]McGovern interview, p. 2.

the authority to do what it takes.[673] The Complaint Resolution Manual has been "the most significant step" OCR has taken to reinvent how it does business.[674] It has enabled OCR to conserve resources on complaints and expand resources allocated to compliance reviews and proactive activities. The Chicago office, for example, now is able to spend approximately 45 percent of its staff resources on compliance reviews and proactive activities, in comparison to at most 10 to 15 percent of its time before the issuance of the Case Resolution Manual.[675] Overall, the Case Resolution Manual has led to positive changes in OCR's case resolution process. OCR has provided staff training on team-building, and it has incorporated a monitoring event system into its case information system, CIS–II.[676]

Complaint Processing

Generally, the enforcement offices' staff are organized into case resolution teams. These teams are headed by team leaders and consist of investigators and attorneys. For example, when a case comes into the Chicago Enforcement Office, it is assigned immediately to one of two complaints teams (the Chicago office also has two compliance review teams). The team discusses the complaint at its weekly meeting, and a specific team of a few individuals is assigned to handle the case. Each case resolution team includes, at a minimum, an investigator, an attorney, and the team leader, but some teams are much larger, depending on the nature of the complaint. The role of the team leader is to make sure that the case gets handled, that the resources are there, and that deadlines are met. In the Chicago Enforcement Office, team leaders are supervisors, but in other offices they are not. In Chicago, even though they are supervisors, the team leaders have been trained to act as team leaders.

In the Philadelphia Enforcement Office, new complaints are assigned to complaint teams on a rotating basis. Every team has a minimum of one attorney who helps the team leader and the investigator in every phase of the complaint. For most complaints, the teams have discretion about how to handle the complaint and can issue findings of violation or no violation. The office's chief attorney and its program manager get involved only if the team is uncertain how to proceed or if they cannot resolve the complaint and therefore OCR needs to proceed with enforcement.[677]

Staff in the New York Enforcement Office are organized into three teams and a special projects unit, each of which has 10 staff members.[678] The teams do not specialize by issue areas, because the Enforcement Director believes it is better for "everyone [to] get an opportunity to be exposed to a variety of issues."[679] However some staff members work more frequently on certain issues.[680] The Dallas Enforcement Office also uses a team approach to complaint processing. When a new complaint comes into the office, the Team Leaders meet to decide which team will handle the complaint. Each team has its own way of approaching complaints.[681]

Compliance Reviews

During the past several years, OCR has changed the way it does compliance reviews. According to instructions sent to OCR senior staff by Assistant Secretary Cantú, OCR has expanded the notion of a case beyond what it traditionally did in its compliance reviews to "allow a broader range of strategies for making positive impact in the lives of children facing discrimination."[682] Currently, OCR considers a case or compliance review to be any proactive enforcement activity that:

> (1) brings resources to bear on behalf of a well-defined student population facing discrimination;
>
> (2) develops a strong educationally sound civil rights remedy that increases educational opportunity for those students; and
>
> (3) ensures that OCR will be prepared to move towards enforcement if results are not achieved as anticipated.[683]

Selecting Issues and Targeting Districts for Compliance Reviews and Developing the Regional Enforcement Docket. Before an OCR enforcement office conducts a compliance review, the office does preliminary research to pinpoint districts with potential problems in selected issue areas. This preliminary

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[673]Ibid.
[674]Ibid.
[675]Ibid.
[676]*See* chap. 5, pp. ##.
[677]Wolf interview, p. 3.

[678]Yvonne Bernier, Team Leader, New York Enforcement Office, telephone interview, June 20, 1996, p. 5.
[679]Whitney interview, p. 2.
[680]Ibid.
[681]August interview, p. 3.
[682]Norma V. Cantú, Assistant Secretary for Civil Rights and Raymond Pierce, Deputy Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to Senior Staff, Component Planning Teams, "Development of the FY 1996 Enforcement Docket," Mar. 1, 1995, pp. 2-3 (hereafter cited as OCR, "FY 1996 Enforcement Docket"). The team's discretion is distinct from OCR's process for issuing a formal finding of a violation, which require decisions by the Regional Director and Assistant Secretary for Civil Rights.
[683]Ibid., *p. 3.*

research involves reviewing inhouse statistics as well as data requested from the State educational agency or the local education agency. It also may involve Internet searches, searches for anecdotal information, and discussions with focus groups and meetings with community and advocacy groups. Based on this preliminary research and the list of OCR priority issues, the enforcement office decides which cases are "ripe for investigation" and places these cases on its proposed enforcement docket, which it sends to headquarters for review and approval.[684]

In preparing their annual enforcement dockets, OCR's regional enforcement offices gather information to select issues and target districts for compliance reviews. In selecting issues for compliance reviews, the regional enforcement offices consider OCR's high-priority issues as well as issues that are important in the States in their regions.[685] According to the head of the Seattle Enforcement Office, "we go through a process of contacting advocacy groups, focus groups, public interest groups, State education agencies, and educators asking them to identify what their sources tell them are the focus civil rights issues in the area."[686] The Philadelphia Enforcement Office has a planning team that is responsible for developing the enforcement docket based on its research on the priority issues.[687]

In selecting districts for compliance reviews, OCR no longer selects districts randomly, nor does it select districts based solely on a statistical analysis of data collected by OCR.[688] Staff collect information from a variety of sources and usually seek input from stakeholders, such as advocacy groups and parents.[689] OCR's priority is to select compliance review sites that will have the greatest impact on students. OCR seeks input from State education agencies on which districts have been in noncompliance or have potential compliance problems.[690] For instance, Jim Littlejohn, the head of OCR's Kansas City Enforcement Office, described the selection process for *Lau* reviews in his office as follows:

> Each year on an ongoing basis, we collect information about schools in the region that comes to our attention or we seek it out. We look at a variety of information, the demographics of the school system, how many national origin students are present, as a starting point, then we will get information from a combination of sources, officials, state representatives, community individuals, civil rights groups, that would indicate to us that there might be a significant number of limited English proficient students in the districts. We also try to identify whether there maybe any issues or concerns around the services delivered to those students. The variety of sources also include newspaper articles. We are really trying to identify where limited resources might be better used.[691]

The head of the Atlanta Enforcement Office indicated that his office reviews statistical data on schools districts, and any other information that they have on file, such as OCR's civil rights surveys, and also consults with advocates.[692]

OCR does not often select small school districts for compliance reviews, because, as indicated in the Strategic Plan, OCR wants to have an impact on the greatest number of students possible.[693] However, to ensure that smaller districts are in compliance with civil rights requirements, regional enforcement offices may provide them with technical assistance through conferences and presentations, and they encourage larger school districts to provide training to smaller districts.[694]

OCR also generally does not do reviews of entire States, because, according to one OCR attorney, "the further away you get from the school district, the more you become involved in process and oversight rather than the day-to-day workings of a school."[695] However, OCR often chooses issues and sites so as to have a Statewide impact.[696] The Atlanta Enforcement Office ensures that all reviews within a particular State focus on the same issue, so that the office can negotiate statewide remedies.[697]

Once a regional enforcement office has selected issues and districts for review, it places them in its proposed enforcement docket, which is sent to headquarters for review and approval. Each proposed review is justified with anecdotal and statistical information.[698]

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[684] *See* Brenda Wolf, Program Manager, Region III, Office for Civil Rights, U.S. Department of Education, telephone interview, June 11, 1996, pp. 1-2 (hereafter cited as Wolf interview).

[685] *See* Coleman interview, pp. 2-3; Lewis interview, p. 6.

[686] Jackson interview, p. 1.

[687] Wolf interview, p. 1.

[688] *See, e.g.*, Smallwood interview, p. 3.

[689] *See* Bates interview, p. 4; Whitney interview, p. 2.

[690] *See* Martinez interview, p. 2; Whitney interview, p. 5; Jackson interview, p. 3.

[691] Jim Littlejohn, Enforcement Director, Kansas City Enforcement Office, telephone interview, Jul. 2, 1996, p. 1 (hereafter cited as Littlejohn interview).

[692] Meyer interview, p. 1.

[693] *See* Goldbecker interview, p. 7; Martinez interview, p. 6.

[694] *See* Martinez interview, p. 2.

[695] Steve Pereira, Chief Civil Rights Attorney, New York Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 20, 1996, p. 8 (hereafter cited as Pereira interview).

[696] See August interview, p. 4; Lewis interview, p. 6.

[697] Meyer interview, p. 1.

[698] Littlejohn interview, p. 2.

In 1986 and 1987 OCR issued policy guidance for the selection of sites for compliance reviews based on the *Adams* court order. However, this document no longer represents OCR's current policy and is considered an historical policy. To date, OCR has not provided any formal guidance to its regional staff establishing OCR's current priorities for compliance review site selection.

Planning and Conducting Compliance Reviews. Under the former Investigative Procedures Manual, OCR staff had to follow specific steps before compliance reviews could be initiated. These steps were rigid, but now, under the Case Resolution Manual, these procedures are more flexible. The enforcement offices are experimenting with different ways of doing compliance reviews.[699] For instance, the Chicago office tries to approach the reviews positively and explain to the recipient that they are trying to help ensure that it is in compliance. When her office initiates a compliance review, she discusses her approach with the recipient, letting it know that if at any time it wants to enter into an agreement, it can. Sometimes offices still collect a lot of information before they approach the recipient to discuss remedies, but other offices collect less information.[700]

Although the Case Resolution Manual no longer requires offices to prepare a formal investigative plan, most regions engage in considerable planning at the outset of a compliance review. OCR generally prepares investigative plans before making onsite visits to compliance review sites.[701] The head of the Philadelphia Enforcement Office described the planning process his office undertakes as follows:

> Once we decide on a strategic area that we're going to focus in and we have done the background research, in terms of the local school district or the State that we are going to investigate, the team consisting of the attorneys, the team leader, and the investigation staff develops a plan. . . . The other thing that they do is they investigate or they review most of the preliminary data that we have already gathered that we used to decide on that particular compliance review in the first place, because they do a lot of up-front data analysis and outreach to make sure that we have an issue that is very important. After they do that, they decide on the approach that they are going to take in terms of the investigative process.[702]

In the Seattle Enforcement Office, attorneys and investigators develop investigative plans after reviewing all of the data collected prior to an onsite visit.[703] In New York, the plans are developed based on standard investigative practices, but each plan is tailored to the particular school district based on information collected from community groups, advocacy groups, and prior contact with the school district.[704]

During the course of a compliance review, OCR staff gather and review a considerable amount of information from a variety of sources. Generally they send a preliminary data request to the school district and review the information before conducting an onsite investigation. They gather information from advocacy groups, parent groups, and other stakeholders in the community. Finally, during the onsite investigation, they interview school district officials and teaching staff, parents, community members, and even students.[705]

If OCR finds a district in noncompliance, it works with the district to fashion a remedial plan. One OCR staff member stated:

> OCR does not develop a plan for the district unless they resist the changes. If the problem is structural or systemic, it is more effective to involve the school district in developing the corrective action so that they accept the changes more easily and feel more responsible for the improvements. OCR's goal is to create a partnership with the school districts to find solutions to their problems.[706]

Partnership Process

OCR uses an innovative "partnership process" to resolve both complaints and compliance reviews. Under this approach, when OCR receives a complaint relating to a school district, OCR notifies the school district of the complaint and gives the district an opportunity to work together with OCR to resolve the complaint.[707] A similar process occurs in the case of a compliance review.[708] According to the program manager in OCR's Philadelphia Enforcement Office, school districts generally respond by calling OCR and saying "we want to resolve this."[709]

Assistant Secretary Cantú has contrasted OCR's partnership approach with its traditional hands-off approach to compliance reviews as follows:

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[699]McGovern interview, p. 2.

[700]Ibid., p. 2.

[701]Shannon interview, p. 4; Wolf interview, p. 5; Jackson interview, pp. 2-3; Whitney interview, p. 4; August interview, p. 4.

[702]Smallwood interview, p. 6.

[703]Jackson interview, pp. 2-3.

[704]Whitney interview, p. 4.

[705]*See* Jonathan Rosenberg, Staff Attorney, New York Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 19, 1996, p. 1 (hereafter cited as Rosenberg interview).

[706]Goldbecker interview, p. 9.

[707]See Lewis interview, p. 7.

[708]*See* "Inside the Education Department: Cantú Hopes OCR's Bark Will Prevent Bite from Justice," *Education Daily Special Supplement*, vol. 29, no. 128 (July 3, 1996), pp. 1-2.

[709]Wolf interview, pp. 4-5.

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[W]e are moving away from the traditional approach where we used to go on-site to collect extensive data and worked almost independently until we arrived at compliance findings, sometimes years later, and often in a confrontational posture. Now we are striving for a partnership approach that recognizes that Federal, state, and local education agencies, as well as parents and other interested parties, share a common goal of providing equal opportunity and access to high quality education for all students. Under this approach, we combine our expertise with these partners and stakeholders to come up with effective solutions. Sometimes this may lead to working with State officials in developing state-wide strategies to address identified civil rights concerns.[710]

Assistant Secretary Cantú emphasized the value of partnerships in fashioning educationally sound remedies:

We are also asking our partners to share in educationally sound remedies when discrimination is identified. I believe this is essential if we are to help bring about positive change, impact on students' lives, and provide tangible assistance to the greatest number of potentially affected students. We want remedial action that makes injured parties whole again, that lessens the chance of future violations, and that sets a clear precedent for other parties.[711]

Although no formal guidance from OCR headquarters exists on the partnership process—the word "partnership" is not even mentioned in OCR's Case Resolution Manual—most regional offices are experimenting with the partnership approach.[712] One of OCR's senior enforcement directors, explained that the partnership approach arose out of innovations made independently within many of the regional offices and as a result the approach may differ from region to region. The Seattle Enforcement Office calls the approach "partnership," and the Kansas City Enforcement Office calls it "profile assessment and resolution reviews (PAR)."[713] The head of the Kansas City Enforcement Office explained, "We are not focussing on making a finding of violation. We are interested in working with the school and the State in partnership, to identify areas that need to be strengthened. . . . My approach with PAR [reviews] is to give schools information about expectations that OCR would have [for what constitutes] full compliance with equal educational opportunity [requirements]. I think, the more information we can provide, the better."[714] The Dallas Enforcement Office also conducts PAR reviews following the Kansas City model.[715]

The Chicago office conducted a *Lau* review in Michigan that demonstrates the use of the partnership approach. Chicago office staff reviewed eight districts in suburban Detroit.[716] They approached all the districts, got them together, and told them that they would send a data request, collect data, and conduct interviews. They explained that they would let the districts know what their preliminary findings were and would give them a chance to enter into an agreement at that stage. Seven of the districts ended up entering into agreements after OCR told them of the preliminary findings; one did not. The office did further investigation for that district and has concluded that the district is not in compliance. It will give that office another chance to enter into an agreement before it issues a letter of finding.[717]

The New York Enforcement Director stated that the partnership idea is "working very well in serving the kids," but that it would take more experience with the approach for OCR to be able to assess its overall effectiveness.[718] She cited the New York Enforcement Office's compliance review of Tarrytown, New York, as a good example of the partnership approach.[719] In that review, OCR was concerned about the disproportionate referral of minorities to special education. OCR entered into a partnership with the school district, and the school district signed a resolution agreement with OCR.[720] As a result, "there has been a reduction in disproportionate referrals."[721] OCR continues to monitor the implementation of the resolution agreement in that case.[722]

The Kansas City Enforcement Office has formalized its partnership process in documents that explain clearly the partnership approach as well as documents implementing the approach for high-priority issue areas.[723] The Kansas City Enforcement Office has issued a document that describes the approach the office takes to

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[710]Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, Remarks at the 2nd Annual Civil Rights summit, Kansas City, Missouri, Sep. 8, 1995, p. 8.

[711]Ibid., *p. 10.*

[712]*See* Lewis interview, p. 10.

[713]Ibid.

[714]Littlejohn interview, pp. 8, 10.

[715]Maria Bates, Special Projects Team Member, Dallas Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 26, 1996, p. 8.

[716]McGovern interview, p. 3.

[717]Ibid.

[718]Whitney interview, p. 7.

[719]Ibid., p. 7.

[720]Resolution Agreement, Union Free School District of the Tarrytowns, Case No. 02-93-5005, attachment to Helen N. Whitney, Regional Director, Office for Civil Rights, Region II, U.S. Department of Education, letter to Dr. Donald R. Kusel, July 24, 1995, submitted as part of DOEd/OCR/New York Response to USCCR's June 6, 1996, letter.

[721]Ibid., p. 8.

[722]Ibid.

[723]These documents are not available through OCR's electronic library.

PAR reviews.[724] The document indicates that the PAR reviews are intended to replace OCR's traditional compliance review process with a streamlined approach that "recognizes that Federal, state, and local education agencies, as well as parents and other interested parties share a common goal of providing equal opportunity and access to high-quality education for all students."[725] The document states that, in conducting PAR reviews, "OCR seeks to combine its expertise with that of state and local school officials, parents, and other community members to reach effective solutions to high-priority civil rights issues."[726] A key feature of a PAR review is that it involves providing school districts with "self-assessment guides" for high-priority issues. School districts can complete the self-assessments quickly as OCR conducts focus group discussions (as opposed to individual interviews) with school district staff as well as with parents and community members.[727] Based on the self-assessments and the focus group discussions, OCR can provide immediate feedback and recommendations to school district officials.[728] The PAR review process also entails working with State education agency officials to develop statewide strategies and with parents and community members to learn their concerns and facilitate dialogue.[729]

The Kansas City Enforcement Office has also developed issue-specific data requests to school districts,[730] issue guidance,[731] and self-assessment guides[732] to be used in PAR reviews for several high-priority issues, including limited English proficiency, overrepresentation of minorities in special education, and equal educational opportunity for minority students in advanced education programs. For each issue area, the data request requests basic statistical and procedural information from the school district.[733] The issue guidance provides the school district with basic information on what is necessary for the school district to be in compliance. For instance, the issue guidance document for limited English proficiency provides a brief statement of school districts' obligation to take affirmative steps to "rectify the language deficiencies of national-origin minority students where inability to speak and understand the English language prevents such students from effective participation in the district's program."[734] It then outlines OCR's approach to applying legal standards in assessing school districts' bilingual education programs in the following areas:[735] identification,[736] assessment,[737] alternative language services,[738] program participation,[739] staffing,[740] instructional materials and resources,[741] exit criteria,[742] program evaluation,[743] parental notice,[744] segregation and facilities,[745] special opportunity programs,[746] and special education for limited-English-

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[724]U.S. Department of Education, Office for Civil Rights, Region VII - Kansas City, Missouri, "Profile Assessment, and Resolution Reviews: Partnership Approaches to Civil Rights Compliance—a Region VII Pilot Program," submitted as part of DOEd/OCR/Region VII response to USCCR's June 16, 1996, letter requesting information (hereafter cited as OCR, Kansas City Enforcement Office, "PAR Reviews").

[725]Ibid., p. 1.

[726]Ibid.

[727]Ibid., p. 2.

[728]Ibid.

[729]Ibid., pp. 2-3.

[730]*See* U.S. Department of Education, Office for Civil Rights, Kansas City Enforcement Office, "Profile Data Request: Equal Educational Opportunities for Limited-English-Proficient Students" (hereafter cited as OCR, Kansas City, "LEP Data Request"); "Profile Data Request: Minorities and Special Education" (hereafter cited as OCR/Kansas City, "Minorities and Special Education Data Request"); and "Profile Data Request: Equal Educational Opportunities for Minorities in Advanced Education Programs" (hereafter cited as OCR/Kansas City, "Minorities in Advanced Education Programs Data Request"), submitted as part of DOEd/OCR/Region VII Response to USCCR's June 26, 1996, letter.

[731]*See* U.S. Department of Education, Office for Civil Rights, Kansas City Enforcement Office, "PAR Issue Brochure: Educational Services for Limited-English-Proficient Students" (hereafter cited as OCR, Kansas City, "LEP Guidance"); "Issue: Minorities and Special Education"; and "Equal Educational Opportunities for Minorities in Advanced Education Programs," submitted as part of DOEd/OCR/Region VII Response to USCCR's June 26, 1996 letter.

[732]*See* U.S. Department of Education, Office for Civil Rights, Kansas City Enforcement Office, "Equal Educational Opportunities for Limited-English-Proficient Students: District Assessment Guide"; "Minorities and Special Education: District Self-Assessment Guide"; and "Equal Educational Opportunities for Minorities in Advanced Education Programs: District Assessment Guide," submitted as part of DOEd/OCR/Region VII Response to USCCR's June 26, 1996 letter.

[733]*See* OCR, Kansas City, "LEP Data Request"; OCR, Kansas City, "Minorities in Special Education Data Request;" and OCR, Kansas City, "Minority Students in Advanced Education Programs Data Request."

[734]*OCR, Kansas City, "LEP Guidance," p. 2.*

[735]For a further discussion of these areas, *see* the forthcoming volume 3 of the Equal Educational Opportunity Project Series.

[736]Ibid., p. 3.

[737]Ibid., pp. 3-4.

[738]Ibid., p. 4.

[739]Ibid., pp. 4-5.

[740]Ibid., p. 5.

[741]Ibid., pp. 5-6.

[742]Ibid., p. 6.

[743]Ibid., pp. 6-7.

[744]Ibid., p. 7.

[745]Ibid., pp. 7-8.

[746]Ibid., p. 8.

proficient students.[747] An appendix to the document summarizes statutes and policies related to limited-English-proficient students.[748]

The self-assessment guides ask districts to rate themselves on scales of 1 to 5 and to answer "yes, no" questions related to the issue area. For instance, the self-assessment guide related to overrepresentation of minorities in special education asks school districts to ascertain whether or not there is a disproportionate enrollment of minorities in various special education programs.[749] Then it asks a series of questions related to prereferral intervention,[750] referral,[751] evaluation,[752] placement,[753] and procedural safeguards.[754]

According to Assistant Secretary Cantú, OCR's partnership approach has achieved positive results. OCR has accomplished a speedier resolution of cases with fewer staff. For example, in 1993 OCR had 854 full-time equivalent (FTE) staff and took 131 days to complete a complaint; in 1995 OCR had only 788 FTEs but averaged 119 days for complaints. Assistant Secretary Cantú noted that the change "has not been easy"; the new partnership approach has meant a culture change from the traditional "hands off" approach. With the partnership approach, OCR has worked under the assumption that "everyone wants the same thing, namely, an end to discrimination. . . . Although [OCR is] prepared to do the traditional investigations, [it is] trying to work with the school districts in pursuit of this common goal."[755] Despite these changes, OCR has not issued formal guidance explaining the partnership approach or formalizing the Kansas City pilot program.

Model Investigative Plans

Some of OCR's enforcement offices have created model investigative plans for a number of issue areas. These model plans are used by complaint and compliance review teams as guides as they develop approaches to individual cases in these issue areas. The Atlanta Enforcement Office provided a copy of its model investigative plans for Title VI gifted and talented reviews,[756] and the Philadelphia Enforcement Office provided a copy of its model investigative plan for ability grouping compliance reviews.[757] These plans are comprehensive and provide sufficient information to guide investigators during issue-specific investigations and compliance analyses. For example, the Atlanta office's model gifted and talented plan includes information on jurisdiction, the legal authority for the investigation, and background facts. It includes approaches for resolving issues, such as the analysis of racial and ethnic data on student representation in gifted and talented programs and the evaluation of screening, referral, and placement procedures. The plan also specifies the types of data and analysis required to complete an investigation and a list of the types of witnesses who should be interviewed. The Philadelphia office's plan on ability grouping is similar, and it also includes a preface discussing principles that investigators should utilize during investigations. The plans, however, only discuss investigations at the factfinding and analysis stages. They do not cover issues such as negotiations and remedies.

The Atlanta office's gifted and talented plan requires a statement of jurisdiction establishing that the recipient has received financial assistance from the Department of Education and specifying the legal authority for the review.[758] It also includes a statement of the issue to be investigated—"whether the recipient discriminates against students on the basis of race with respect to its gifted and talented program/services in violation of title VI . . . ."[759] It leaves room for background information on case chronology and recipient background,[760] and then lays out an approach to resolving the issue, which includes: obtaining data to determine whether black students are underrepresented in the district's gifted and talented program; whether the district has nondiscriminatory screening, referral, and placement procedures; and whether the procedures and policies are applied in a nondiscriminatory manner.[761] It specifies the types of data and analysis needed to establish underrepresentation and to ensure that the district's policies and procedures are

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[747]Ibid.

[748]Ibid., appendix.

[749]OCR, Kansas City, "Minorities in Special Education Self-Assessment Guide," pp. 1-2.

[750]Ibid., pp. 2-3.

[751]Ibid., pp. 4-5.

[752]Ibid., pp. 5-10.

[753]Ibid., pp. 10-11.

[754]Ibid., pp. 11-13.

[755]Cantú interview, p. 5.

[756]"Model Investigation Plan Title VI—Gifted and Talented Programs," submitted by DOEd/OCR/Atlanta following USCCR's onsite review (hereafter cited as OCR, Atlanta, "Model Investigative Plan for Title VI Gifted and Talented Programs Compliance Review").

[757]"Investigative Plan: Ability Grouping Compliance Review," submitted as part of DOEd/OCR/Philadelphia response to USCCR's June 6, 1996 letter (hereafter cited as OCR, Philadelphia, "Model Investigative Plan for Ability Grouping Compliance Review").

[758]OCR, Atlanta, "Model Investigative Plan for Title VI Gifted and Talented Programs Compliance Review," p. 1.

[759]OCR, Atlanta, "Model Investigative Plan for Title VI Gifted and Talented Programs Compliance Review," p. 2.

[760]Ibid.

[761]Ibid., pp. 2-3.

nondiscriminatory and applied in a nondiscriminatory manner.[762] Finally, it includes a list of the types of witnesses a compliance review team should interview, including the superintendent, administrators, gifted and talented and regular classroom teachers, teachers and other professionals involved in the referral and evaluation process, State education agency gifted and talented specialists, school counselors, and others (such as parents).[763]

The Philadelphia office's ability grouping plan has a format similar to the Atlanta office's plan, except that it is prefaced by a discussion of the principles that should be kept in mind during ability grouping investigations. This preface summarizes the three parts of an ability grouping investigation: determining if there is a prima facie case of discrimination based on statistical disparities, considering any educational justifications, and analyzing whether the justifications are pretextual.[764] Like the Atlanta office's gifted and talented plan, the ability grouping plan has sections on statement of jurisdiction,[765] statement of issue,[766] and background.[767] It then discusses data needs and specifies what types of analyses should be done before onsite investigation, during onsite investigation, and after onsite investigation.[768]

Monitoring

Once a complaint or compliance review has been resolved through an agreement by the recipient to take corrective action, OCR monitors the recipient to ensure that the agreement is implemented. The head of the Philadelphia Enforcement Office explained the need for monitoring: "It has no value at all unless you follow up, because the school districts will tell you one thing, in terms of the assigned assurances, and they just do not follow through as diligently as they should."[769] The head of OCR's Chicago Enforcement Office reported that her office spends a lot of time on monitoring. In Chicago, the plan for every case includes a plan for monitoring. The frequency and amount of monitoring done depends on what is called for in the specific case, but each case has a specific monitoring schedule.[770] The head of the Kansas City Enforcement Office indicated that his office has a goal of at least 1 full year of monitoring to implement fully each corrective action plan.[771]

Technical Assistance, Outreach and Education, and Other Proactive Activities

Outreach and education and technical assistance are essential components of an effective civil rights enforcement program. With the Strategic Plan's renewed emphasis on proactive activities, OCR has incorporated outreach and education and technical assistance as essential ingredients in its compliance reviews. However, OCR's regional enforcement offices appear to have cut back on delivery of technical assistance and outreach and education outside of such reviews. Moreover, OCR has not allocated adequate staff to this important task.

Staff in several regional offices indicated that their offices are not initiating as much technical assistance as they previously did. The head of OCR's Philadelphia Enforcement Office indicated that, although his office continues to provide technical assistance upon request, resource constraints and a growing workload prevent the office from doing a great deal of outreach and technical assistance on its own.[772] He attributed the public's ignorance of the provisions of Title VI in part to OCR's lack of outreach.[773] The Philadelphia Enforcement Office's program manager, however, maintained that the office both responds to requests and initiates technical assistance. She said, "We are out there trying to get the word out about OCR's enforcement obligations and the obligations of the school district[s]."[774] In OCR's Atlanta office, funding cuts have limited the office's ability to participate in conferences, workshops, and seminars as it had previously.[775] The Atlanta office has not conducted any technical assistance since October 1995 because of budgetary constraints.[776] In OCR's Chicago Enforcement Office, the staff responds to requests for technical assistance, and technical assistance is written into staff's performance plans. However, the office has had to cut down on the amount of travel it does for technical assistance because of budget cuts. Furthermore, the uncertain budgetary environment in fiscal year 1996 prevented the office from planning technical assistance activities.[777] The head of the New York Enforcement

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[762]Ibid., pp. 3-9.
[763]Ibid., p. 9.
[764]OCR, Philadelphia, "Model Investigative Plan for Ability Grouping Compliance Review," preface.
[765]Ibid., p. 1.
[766]Ibid., pp. 1-2.
[767]Ibid., p. 2.
[768]Ibid., pp. 2-11.
[769]Smallwood interview, p. 12.
[770]McGovern interview, p. 3.
[771]Littlejohn interview, p. 11.
[772]Smallwood interview, p. 5.
[773]Ibid., p. 8.
[774]Wolf interview, p. 2.
[775]Archie Meyer, Enforcement Director, Atlanta Enforcement Office, Office for Civil Rights, U.S. Department of Education, interview in Atlanta Georgia, June 4, 1996, p. 6 (hereafter cited as Meyer interview).
[776]Shannon interview, p. 3.
[777]McGovern interview, p. 3.

Office said that her office has not been initiating technical assistance.[778] Assistant Secretary Cantú confirmed that decreases in OCR's budget limited its ability to conduct outreach, education, and technical assistance activities. For part of fiscal year 1996, OCR operated under a continuing resolution with a substantially reduced budget of $53 million.[779] To adjust to this reduced budget, OCR limited its travel and publication budgets.[780]

Despite these reductions in traditional technical assistance and outreach and education activities, OCR's regional enforcement offices are melding technical assistance and outreach and education on high-priority areas into their proactive enforcement agendas. The new emphasis on the partnership process means that technical assistance and outreach and education are now incorporated as essential elements of compliance reviews.[781] One of OCR's two senior enforcement directors, described the partnership process as a "kind of gray area" between traditional technical assistance and compliance reviews.[782]

Staff Training

OCR's efforts to provide staff training reflect an active effort to respond to evolving needs. OCR's training consists of inhouse training provided by OCR's staff members, training provided under contract by groups or individuals outside of OCR, and attendance at conferences or seminars held by outside organizations. The training provided under contract usually covers topics related to standard skills, such as management training and computer training. For example, in FY 1994, of the $8,000 allocated to OCR's Policy, Enforcement and Program Service for special training needs, $4,500 went to cross-service team building training.[783]

Most of OCR's substantive training on its civil rights implementation and enforcement responsibilities is provided largely at no cost because the training is conducted inhouse or through the U.S. Department of Justice. For example, in 1994, OCR held a training session on its Complaint Resolution Manual for OCR staff.[784] In addition, OCR has held internal workshops and conferences on high-priority issues. For example, OCR staff members at headquarters have provided training to regional staff on OCR's policy on minority students in special education.[785] OCR's Region VIII and IX offices have hosted *Lau* conferences over the last few years.[786] In March 1996, OCR staff members in the Region VIII office provided training to staff in the Region VI and Region VIII offices by telephone conference. The topic was special education and language minority students, and it covered issues such as prereferral and referral processes, evaluation procedures, placement and services, dual services, and special education notices.[787]

OCR does not provide formal training to its staff on the validity or content of education practices or on DOEd's programs. Because OCR does not consider itself an expert on education issues,[788] it relies on external education experts and consultants for information on the validity of education practices. OCR does not provide formal training on the use and importance of education experts or on the substantive education issues associated with its civil rights responsibilities.

OCR has provided its staff training on topics, such as the Case Resolution Manual, priority issue areas, investigative guidance, and policies, primarily through inhouse training sessions and telephone conferences. OCR also has allowed staff to attend training conferences held by public interest organizations, such as the NAACP. Of the priority target areas, OCR has been most active in providing training on *Lau* issues. For example, over the last few years, staff members in OCR's San Francisco and Denver Enforcement Offices have provided telephone conference training on the education of students who have limited English proficiency. On other issues, such as within-school grouping practices, OCR has provided inhouse training on its "Minority Students in Special Education" policy. The training provided on other substantive policy issues, however, has been more limited.

In recent years, OCR has produced a number of finalized and draft versions of investigative guidance. They address topics such as ability grouping, minority students in special education, fairness in testing, and underrepresentation of female and minority students in

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[778]Whitney interview, p. 1.

[779]See discussion above on OCR's budget, p. 183.

[780]Cantú interview, p. 5.

[781]See McGovern interview, p. 3.

[782]Lewis interview, p. 7.

[783]Jeannette J. Lim, Director, Policy, Enforcement, and Program Service, Office for Civil Rights, U.S. Department of Education, memorandum to Raymond C. Pierce, Deputy Assistant Secretary for Civil Rights, "PEPS Training Plan," Feb. 2, 1994, p. 1.

[784]Ibid., p. 2.

[785]Peelen interview, p. 6 (Jean Peelen is also the former issue coordinator for minorities in special education and former director of the Elementary and Secondary Education Policy Division in OCR's former Planning, Analysis, and Systems Service.)

[786]Susan Bowers, Senior Enforcement Director, and former issue coordinator on testing issues, Office for Civil Rights, U.S. Department of Education, interview in Washington, DC, May 28, 1996, p. 13.

[787]U.S. Department of Education, Office for Civil Rights, Special Education and Language Minority Students, teleconference held on March 13, 1996 (handout).

[788]*See* Cantú interview, p. 6.

advanced mathematics and science classes. Although these materials provide enough detail to serve as self-teaching guides for OCR's investigators, they are not sufficient to provide staff members with practical knowledge on the application of investigative methods, analyses for finding discrimination, negotiating strategies, and effective remedies. The Commission's interviews with OCR's regional staff indicate that OCR's staff requires more training on the application of OCR's detailed policies to actual cases.

OCR has had opportunities to receive training on topics to supplement its staff's knowledge of civil rights. For example, OERI offered to provide OCR staff with training on education models and practices. However, OCR has not yet accepted OERI's offer.

OCR's regional training allocation for FY 1995 was as follows: Region I, $8,200; Region II, $9,100; Region III, $11,800; Region IV, $18,700; Region V, $17,600; Region VI, $14,200; Region VII, $8,400; Region VIII, $8,400; Region IX, $14,400; and Region X, $6,700.[789]

OCR's Use of Computer Technology

OCR has used the advantages of computer technology to enhance its implementation, compliance, and enforcement responsibilities. Since 1982 OCR has maintained its complaints and compliance review data on computer database systems. OCR's first system was the Automated Case Information Management System (ACIMS), which was replaced by the Case Information System (CIS) in 1993. In 1995 OCR upgraded the CIS database system into a more user-friendly Windows system, known as OCR's Case Information System for Windows (CIS II), and that same year, OCR provided training to OCR staff members on the new system.[790] A monitoring event system was combined into the database which enables OCR staff to track and update monitoring activities more easily. The system allows OCR staff to identify a case or set of cases in a number of ways, for example, by docket number, date, region, recipient name, issue, and/or jurisdiction basis. It allows OCR to compile reports with greater ease and efficiency. In addition, it permits OCR staff to identify and view the status of cases in a time-efficient manner.[791]

OCR also has established electronic communication among its headquarters and regional staffs. Its electronic mail system also allows OCR staff to communicate with external agencies and the public generally.

In addition to its complaints and compliance review database system, OCR has codified its policy memoranda, policy letters, and letters of finding that constitute new policy in a computerized "Policy Codification System." The policy codification system is part of OCR's larger electronic library that it recently created to facilitate document management and promote internal access to information. OCR's electronic library is a Windows-based system containing collections of documents. For example, the case letters collection contain OCR's letters of findings, recipient agreements, resolution letters, and corrective action plans. The resource guide collection contains sections of OCR's Title VI, Title IX, Age Discrimination Act, and section 504/Title II manuals, divided by topic. The policy documents collection contains OCR's current and historical policies. The reports, speeches, and testimony collection contains the press releases of all relevant Federal agencies that influence OCR's work. That collection also contains testimony before Congress, courts, and other forums relating to OCR's work. The statutes and regulations collection contains the texts of Federal and State statutes and regulations relating to civil rights in education. The investigative materials collection contains OCR's Case Resolution Manual, a list of school districts under Federal court desegregation orders, and forms and sample letters that OCR's staff members can use as models in doing their work. The technical assistance materials/publications collection contains pamphlets, booklets, technical assistance handouts and letters, lists of technical assistance audio tapes and videos on various topics, lists of technical assistance presentations, book lists and bibliographies related to OCR's work, lists of conferences and meetings on various topics; and directories of experts on various topics.[792] Each regional/enforcement office is equipped with at least one personal computer that provides access to OCR's electronic library. However, OCR has not made the electronic library available to the public.

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[789]Raymond C. Pierce, Deputy Assistant Secretary, Office for Civil Rights, U.S. Department of Education, memorandum to Regional Civil Rights Directors, Regions I-X, "FY 1995 Training Allocation," Nov. 9, 1994.

[790]U.S. Department of Education, Office for Civil Rights, Using OCR's Case Information System for Windows (CIS II), Aug. 8, 1995.

[791]Ibid. OCR provided the Commission with access to OCR's CIS II database during the Commission's factfinding. Commission staff members were able to identify cases and compile reports with relative ease.

[792]U.S. Department of Education, Office for Civil Rights, "Electronic Library Keywords Definitions List," May 14, 1996, p. 2.

Overall, OCR has made efficient use of computer technology. Its CIS II database and electronic library are user friendly. These systems, and OCR's electronic mail system, have promoted greater interaction among regional enforcement offices and between the regional offices and headquarters. It has provided staff members with improved access to the resources that supplement their knowledge and improve their ability to do their work. For example, with agencywide access to case letters, resource guide materials, and technical assistance documents, OCR staff have models to develop better case strategies, remedies, outreach programs, and technical assistance activities.

Analysis of OCR's Complaints and Compliance Reviews Databases

Numbers of Complaints and Compliance Reviews

From 1982 to 1993, OCR used the Automated Case Information Management System (ACIMS) to track complaints and compliance reviews. Since 1993 OCR has used the Case Information System (CIS) to track its enforcement activities. The Commission's analysis focused primarily on data from both the ACIMS and CIS data bases from 1982 to 1995.[793]

The databases include information on a total of 48,676 complaints received, 47,231 complaints resolved, 2,370 compliance reviews initiated, and 2,336 compliance reviews resolved between 1982 and 1995.[794] In 1982 OCR received 1,840 complaints, compared to 4,981 in 1995.[795] The number of complaints received has steadily increased from 1982 to 1995, except for small reductions in 1987 and 1989.[796] The number of complaints resolved has risen and dropped periodically between 1982 and 1995.[797] In 1982 OCR resolved 2,270 complaints as compared to 5,580 in 1995.

On average, slightly less than two-thirds of all complaints OCR receives and resolves are complaints against elementary and secondary institutions.[798] However, reflecting the priority issues chosen by OCR, a much larger percentage of compliance reviews than complaints are against elementary and secondary institution recipients. In fiscal year 1995, 86 percent of all compliance reviews initiated were reviews of elementary and secondary institutions, as compared to 63 percent in 1982.[799]

Between fiscal years 1994 and 1995, the number of complaints OCR received and the number of complaints OCR resolved decreased.[800] The number of compliance reviews initiated also decreased, but the number of compliance reviews resolved increased.[801] OCR reported 161 compliance reviews initiated and 91 compliance reviews resolved in fiscal year 1994, and 95 compliance reviews initiated and 175 compliance reviews resolved in fiscal year 1995.[802] This anomaly reflects OCR's decision to move to a fiscal year calendar for compliance reviews, with reviews being initiated at the beginning of a fiscal year and resolved by the end of the same fiscal year. Fiscal year 1995 was a transition year, in which many regions attempted to resolve all outstanding compliance reviews, so that they could begin fiscal year 1996 with a clean slate. Thus, many regions initiated fewer reviews in fiscal year 1995, so that they could devote resources to completing compliance reviews that they had begun in previous years.

Bases of Complaints and Compliance Reviews

The vast majority of complaints received by OCR cite disability as the basis of the alleged discrimination. Between 1982 and 1993 a total of 58.6 percent of OCR's complaints received were based on disability.[803] In comparison, the percentages of complaints received on the basis of race (21.8 percent), national origin (7.0 percent), sex (17.4 percent) or age (6.1 percent) were much smaller between 1982 and 1993.[804] In fiscal year 1995, 59.4 percent of all complaints received were filed on the basis of disability under section 504, and 24.5

[793] OCR afforded the Commission access to its computerized civil rights complaints and compliance reviews data bases. Because OCR made the transition from the ACIMS data base to the CIS data base in the middle of fiscal year 1993, the fiscal year 1993 data are incomplete and slightly skewed. Therefore, the numbers of complaints received and resolved and the numbers of compliance reviews initiated and resolved in fiscal year 1993 cannot be compared accurately with the numbers for the other fiscal years. Furthermore, it should be noted that the CIS database's numbers for fiscal years 1994 and 1995 are inconsistent with the numbers OCR reported in its fiscal year 1996 budget request. *See* table 5.2. However, the Commission's analysis will proceed from the assumption that the fiscal year 1994 and 1995 numbers in the CIS database are correct and complete.

[794] *See* table 5.3 and figure 5.1.

[795] *See* table 5.3 and figure 1.

[796] *See* table 5.3 and figure 5.1.

[797] *See* table 5.3 and figure 5.1.

[798] *See* table 5.3 and figure 5.1.

[799] *See* table 5.3 and figure 5.1.

[800] *See* table 5.3 and figure 5.1.

[801] *See* table 5.3 and figure 5.1.

[802] *See* table 5.3 and figure 5.1.

[803] *See* table 5.4 and figure 5.2.

[804] *See* table 5.4 and figure 5.2.

percent of the complaints received were filed on the basis of disability under Title II of the Americans with Disabilities Act.[805] In comparison, the percentages of complaints received on the basis of race (19.9 percent), national origin (8.1 percent), sex (11.9 percent) or age (3.8 percent) were much smaller.[806] The bases for compliance reviews OCR initiated, however, reflect OCR's effort to focus its proactive efforts on the priority issues. Out of a total of 95 compliance reviews initiated in fiscal year 1995, for instance, only 7 were based on disability under section 504 and 3 were based on disability under Title II. By contrast, 46 of the reviews were based on race, and 51 of the reviews were based on national origin. Twelve reviews were based on sex, but none on age.[807]

Since each individual complaint or compliance review can raise several different issues, the databases permit OCR to designate multiple issues for each individual case. Roughly one-half of all complaints received by OCR between 1993 and 1995 cited more than 1 issue, with some complaints having more than 10 issues designated.[808] On average, approximately 2 issues are raised per complaint OCR receives.[809] The percentage of compliance reviews with more than 1 issue designated is even higher than for complaints: more than three-quarters of all compliance reviews have more than 1 issue designated, and almost one-fifth of compliance reviews have more than 10 issues designated.[810] On average, approximately 7.4 issues were raised per compliance review initiated by OCR between 1993 and 1995.[811]

For each complaint or compliance review, the CIS database contains a variable providing the general jurisdiction/basis of the complaint or compliance review. However, the CIS database provides more detailed information on the specific basis for each issue raised in a complaint or compliance review. The Commission examined the specific bases for issues raised in OCR's complaints and compliance reviews.

In fiscal years 1993-1995, 58 percent of the issues raised in complaints received by OCR were on the basis of disability, 25 percent of the issues were on the basis of race and/or national origin, 11 percent were on the basis of sex, and 1 percent were on the basis of age.[812] For issues for which disability was designated as a basis, the most common disability designated was "general handicap," followed by "learning disabled." Almost 20 percent of issues designating disability as a basis designated learning disability as a specific basis. The CIS database does not incorporate specific basis codes that would allow the number of issues related to "educable mental retardation," "serious emotional disturbance," or "behavioral disorders" to be determined. However, mental retardation was designated as a specific basis in only 4 percent of issues designating disability as a basis.[813]

Among issues raised in complaints designating race or national origin as a basis, the most common specific basis designated was "black, not Hispanic." Sixty-one percent of all race/national origin issues designated "black, not Hispanic" as the specific basis. Twenty percent designated Hispanic, 6 percent designated American Indian or Alaskan Native, and 4 percent designated Asian or Pacific Islander as a specific basis. Three percent designated "minority white," and 5 percent, "nonminority white" as specific bases.[814]

Among issues designating sex as a basis, the most common specific basis (79.8 percent) was "discrimination against females." Most of the rest of the issues (18.1 percent) designated discrimination against males as the specific basis, but several issues were based on maternity discrimination and family status.[815]

The issues in OCR's compliance reviews were much less likely to be based on any disability and more likely to be based on race/national origin than the issues in the complaints OCR received. Fewer than 5 percent of the issues in OCR's compliance reviews were based on disability, but 72 percent were based on race or national origin.[816] Reflecting OCR's choice of the education of students with limited English proficiency as a priority issue, OCR's compliance reviews were more likely to be based on Hispanic national origin than on black race. Also, 29 percent of the issues raised in compliance reviews based on all minority races and national origins, in contrast to less than 3 percent of issues raised in complaints.[817]

Issues Raised in Complaints and Compliance Reviews

Altogether, from fiscal year 1993 through fiscal year 1995, a total of 26,027 issues were raised in complaints

[805] Individual complaints can have multiple bases, jurisdictions, and issues.
[806] *See* table 5.5.
[807] *See* table 5.5.
[808] *See* table 5.6.
[809] *See* table 5.6.
[810] *See* table 5.6.
[811] *See* table 5.6.
[812] *See* table 5.7.
[813] *See* table 5.7.
[814] *See* table 5.7.
[815] *See* table 5.7.
[816] *See* table 5.8.
[817] *Compare* table 5.7 and table 5.8.

received by OCR. The most common major categories of issues raised in these complaints are "Student/Beneficiary Treatment" (24.6 percent of issues raised) and "Assignment of Students" (20.5 percent).[818] In the "Assignment of Students" category, consistent with the large numbers of complaints that cite disability as a basis, the most common major issue was the assignment of students with physical or mental impairments.[819] Apart from issues relating to disability, the issues of central concern to this report were not raised frequently in complaints received by OCR. Ability grouping and tracking complaints account for 68 (0.3 percent) out of the 26,027 issues raised; overrepresentation of minorities in special education, for 14 issues (0.1 percent); assignment of students whose primary or home language is other than English, for 223 issues (0.9 percent); and special education for students with limited English proficiency, for 131 issues (0.5 percent). No complaints raised an issue relating to underrepresentation of females and minorities in math and science courses.[820]

Compliance reviews, on the other hand, reflect OCR's high-priority issues, and a far higher percentage of compliance reviews related to the Commission's focus issues. For instance, of the 2,559 issues raised in OCR's compliance reviews, 1,054 (41.2 percent) were related to the assignment of students whose primary or home language is other than English, and 239 (9.3 percent) related to the provision of special education for students with limited English proficiency.[821] Whereas no complaints raised issues related to underrepresentation of minorities in math and science courses, these issues accounted for 27 of the issues in OCR's compliance reviews.[822]

Resolution of Complaints and Compliance Reviews

In fiscal year 1995, 42.8 percent of OCR's resolved complaints were resolved before investigation, were referred to other agencies, or were handled through another process; 23.5 percent of complaints 33.2 percent of complaints were resolved with the recipient taking corrective action before OCR issued a letter of finding.[823] Only 62 complaints (less than 0.01 percent) were resolved after a letter of finding of violation was issued. Of these, 6 were settled after administrative proceedings were initiated, 2 were resolved through administrative proceedings, and 38 were referred to the Department of Justice for enforcement.[824] The CIS database reflects OCR's new emphasis on early case resolution. In fiscal years 1994 and 1995, OCR resolved slightly more than 11,000 complaints each year. Of these, more than 500 each year (approximately 4.5 percent) were resolved through OCR-facilitated early complaint resolution.[825] Of the complaints in the CIS database for fiscal year 1993, on the other hand, only 1.1 percent were closed through early complaint resolution.[826]

Compliance reviews had a much lower chance than complaints of being resolved in the early stages. In fiscal year 1995, only 4.1 percent of compliance reviews were resolved through referrals, were handled though another process, or were discontinued.[827] Almost three-quarters (74.1 percent) of the compliance reviews were resolved through the recipient making changes before enforcement, and slightly over one-fifth (21.8 percent) were resolved with the recipient not having to make any changes.[828]

Analysis of Complaints and Compliance Reviews by Region

The annual number of complaints received and resolved, as well as the number of compliance reviews initiated and completed varied from region to region. For instance, in fiscal year 1995, the number of complaints received ranged from a low of 286 for Region X (Seattle)[829] to a high of 664 for Region IX (San Francisco).[830] In fiscal year 1994, the same two regions received the lowest and highest number of complaints, respectively. With respect to complaints resolved, Region IV (Atlanta) had the highest number in both fiscal year 1994 (996) and fiscal year 1995 (969), but Region X (Seattle) again had the lowest number.[831] The number of compliance reviews initiated and completed also varies from region to region. Region IX initiated and completed a large number of reviews (32 compliance reviews initiated and 35 completed in fiscal year 1995). At the other end of the spectrum, Region I (Boston), Region II (New York), Region III (Philadelphia), and Region V (Chicago) initiated and

[818] *See* table 5.9.
[819] *See* table 5.9.
[820] *See* table 5.9.
[821] *See* table 5.10.
[822] *See* table 5.10.
[823] *See* table 5.11.
[824] *See* table 5.11.
[825] *See* table 5.11.
[826] *See* table 5.11.
[827] *See* table 5.11.
[828] *See* table 5.11.
[829] "Region XV" refers to the Cleveland office, which has become a regional office under OCR's new reorganization.
[830] *See* table 5.12 and figure 5.3.
[831] *See* table 5.12 and figure 5.3.

completed many fewer compliance reviews (fewer than 23 each).[832]

Regions also vary with respect to the issues of complaints they receive and compliance reviews they initiate. For instance, the number of issues relating to limited English proficiency in complaints received by regions between 1993 and 1995[833] ranged from 8 in Region V (Chicago) to 94 in Region IX (San Francisco).[834] The number of issues relating to limited English proficiency raised in compliance reviews initiated by regions varied similarly, ranging from 13 in Region III (Philadelphia) to 459 in Region VIII.[835] Reflecting OCR's decision to make limited English proficiency a priority issue, all regions appear to have initiated a substantial number of compliance reviews related to limited English proficiency, not just those regions with large numbers of immigrants.[836]

Most regions received few complaints relating to ability grouping and tracking, but Region III (Philadelphia) received complaints raising 22 issues in this area, and Regions IV (Atlanta) and IX (Seattle) each received complaints raising 11 ability grouping and tracking issues.[837] Regions also initiated very few compliance reviews related to ability grouping and tracking. Half of the regions initiated no compliance reviews in this area. Regions generally received more complaints relating to assignment of students to gifted and talented programs, but initiated few compliance reviews related to this issue. However, the issue was raised 28 times in compliance reviews initiated by Region VI (Kansas City).[838]

The issue of assignment to special education based on race, which encompasses overrepresentation of minorities in special education was raised frequently, particularly in Regions III (Philadelphia) and IV (Atlanta).[839] Several regions focused compliance reviews in this area as well. In particular, the assignment of special education based on race was raised 52 times in compliance reviews initiated by Region VI (Kansas City).[840]

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[832]*See* table 5.12 and figure 5.3.

[833]Complaints in the CIS database.

[834]*See* table 5.13.

[835]*See* table 5.14.

[836]*See* tables 5.13 and 5.14.

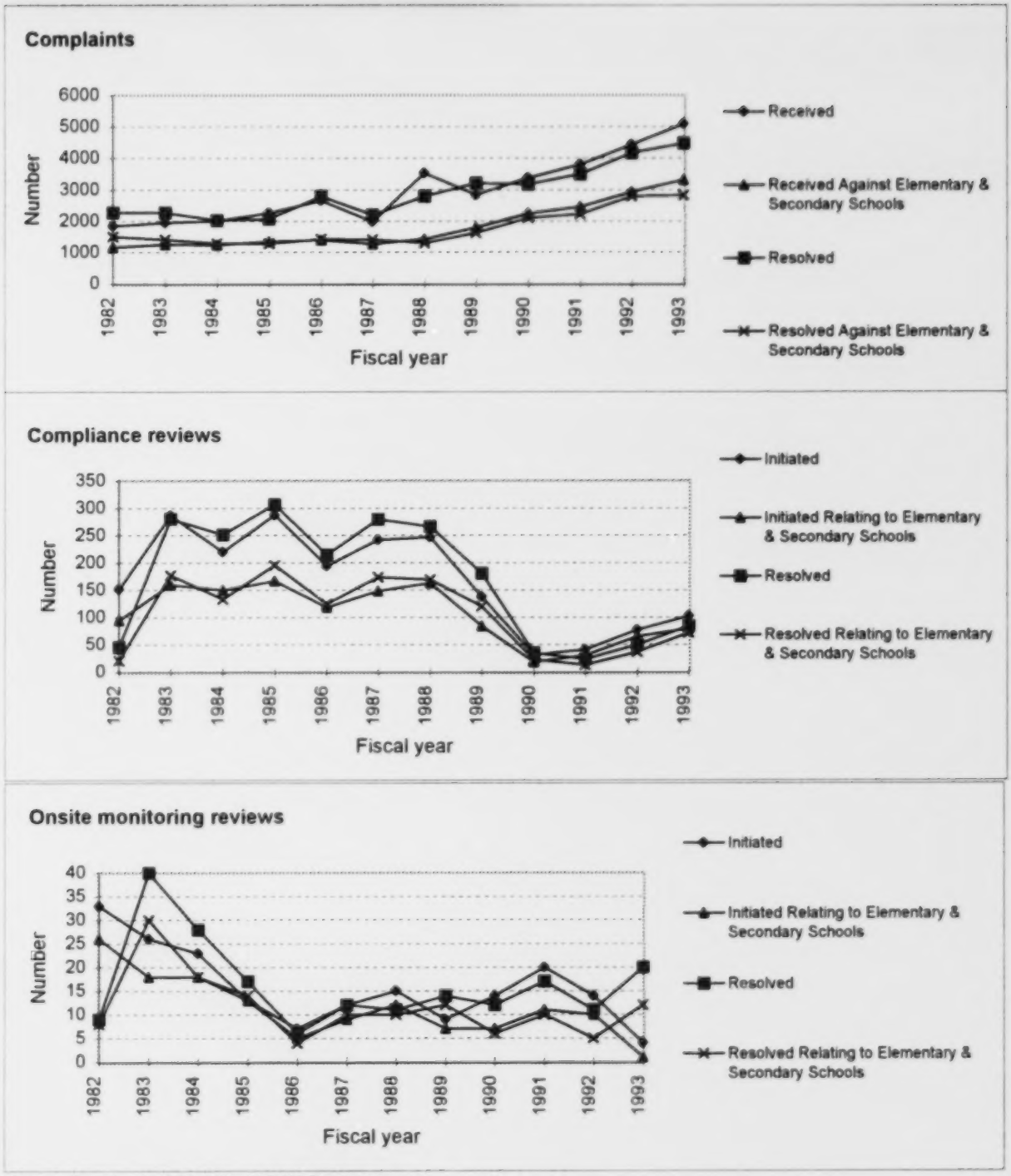
[837]*See* table 5.13. It is not possible, without further analysis of the CIS database, to determine whether these 21 issues were raised in 21 separate complaints or whether several different issues were raised in the same complaint.

[838]*See* table 5.14.

[839]*See* table 5.13.

[840]*See* table 5.14.

FIGURE 5.1
Complaint and Compliance Review Activity by Year



Source: Department of Education (ACIMS Database)

FIGURE 5.2
Complaints Received by Basis and Fiscal Year

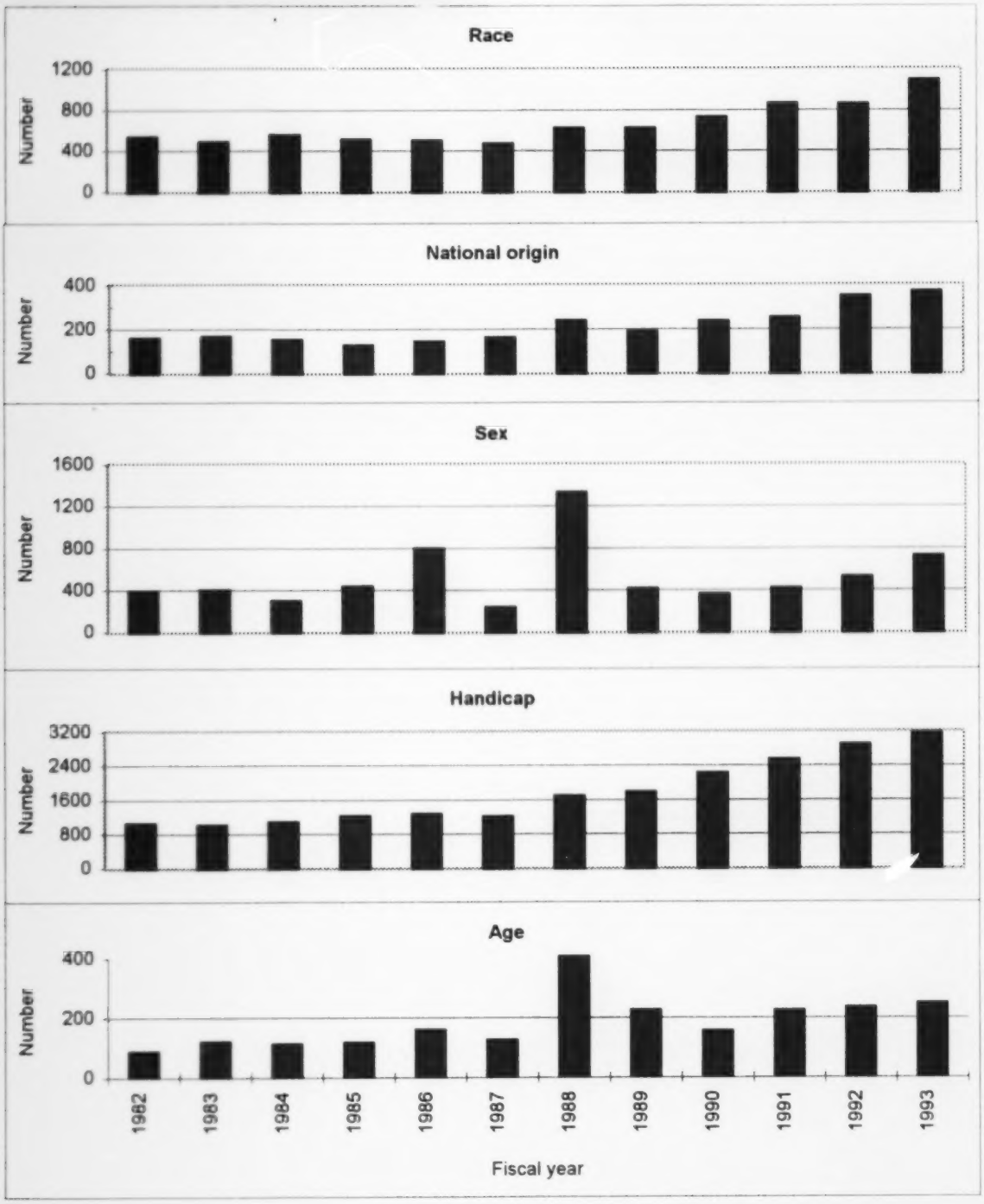


TABLE 5.1
Office for Civil Rights Funding* and Staffing History, FY 1981 FY 1996

	Congressional appropriations		Actual obligations		
FY	Millions of $	Millions of constant $	Millions of $	Millions of constant $	Full-time equivalent staffing levels
1981	46.9	68.7	46.1	67.5	1,099
1982	45.0	61.7	44.2	60.6	1,022
1983	44.9	59.0	44.9	59.0	941
1984	49.4	61.4	44.4	55.2	907
1985	45.0	54.4	44.6	53.9	913
1986	42.7	50.8	41.8	49.8	843
1987	43.0	50.4	41.7	48.9	807
1988	40.5	46.4	40.3	46.2	808
1989	41.6	46.3	41.2	45.9	789
1990	44.6	48.0	44.5	47.9	815
1991	48.4	49.9	48.3	49.8	797
1992	53.6	53.6	53.3	53.3	848
1993	56.4	55.0	56.1	54.7	854
1994	56.6	53.7	56.5	53.6	821
1995	58.3	53.2	N/A	N/A	788
1996	55.2	49.3	N/A	N/A	N/A

Sources: U.S. Department of Education, Office for Civil Rights, *FY 1995 Annual Report to Congress*; and U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement* (June 1995), pp. 7, 9.

* Dollar figures are in millions of dollars. The constant dollar numbers are in 1992 dollars. The current dollar amounts are deflated by a chain-type gross domestice product price index for Federal Government expenditures developed by the Bureau of Economic Analysis, U.S. Department of Commerce.

TABLE 5.2
Office for Civil Rights Workload, FY 1981 FY 1996

FY	Complaints received	Compliance reviews started
1981	2,889	136
1982	1,840	208
1983	1,940	287
1984	1,934	220
1985	2,240	286
1986	2,648	197
1987	1,976	240
1988	3,532	247
1989	2,840	138
1990	3,384	32
1991	3,809	41
1992	4,432	77
1993	5,090	100
1994	5,276	144
1995	5,856	200
1996	6,349	200

Sources: U.S. Department of Education, Office for Civil Rights, "Fiscal Year 1996 Budget Request," "Fiscal Year 1985 Budget Request," and U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement* (June 1995), pp. 7, 9.

TABLE 5.3
Complaint and Compliance Review Activity by Fiscal Year

	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	Total
Complaints															
Received	1,840	1,953	2,003	2,260	2,648	1,976	3,532	2,841	3,382	3,806	4,434	7,747	5,273	4,981	48,676
Received against elementary & secondary schools	1,166	1,252	1,245	1,345	1,402	1,274	1,423	1,802	2,246	2,452	2,937	5,132	3,456	3,136	30,268
Resolved	2,270	2,265	2,030	2,076	2,795	2,194	2,789	3,206	3,180	3,497	4,180	5,415	5,754	5,580	47,231
Resolved against elementary & secondary schools	1,505	1,417	1,284	1,289	1,426	1,409	1,309	1,627	2,103	2,224	2,796	3,432	3,780	3,645	29,246
Compliance reviews															
Initiated	152	287	220	288	195	242	247	138	32	41	77	195	161	95	2,370
Initiated against elementary & secondary schools	95	160	150	167	118	148	163	84	18	31	65	148	127	82	1,556
Resolved	46	281	252	307	215	280	267	181	35	24	50	132	91	175	2,336
Resolved against elementary & secondary schools	21	177	133	196	125	174	169	120	23	13	37	111	69	138	1,506

Source: Office for Civil Rights, U.S. Department of Education, Automated Case Information Management System and Case Information System Data Bases.

TABLE 5.4
Complaint and Compliance Review Activity by Basis and Fiscal Year

	Number by fiscal year												
	1982	**1983**	**1984**	**1985**	**1986**	**1987**	**1988**	**1989**	**1990**	**1991**	**1992**	**1993**	**Total**
Basis of complaints received													
Race	527	481	548	505	496	467	617	618	723	859	852	1,089	7,782
National origin	156	164	149	126	141	160	237	187	233	249	348	368	2,518
Sex	377	394	291	429	787	226	1,326	403	349	408	518	717	6,225
Handicap	1,029	993	1,070	1,205	1,257	1,191	1,678	1,773	2,219	2,530	2,886	3,143	20,974
Age	86	119	111	116	158	124	404	223	155	222	232	246	2,196
Other	2	6	7	15	8	7	12	12	17	18	43	40	187
No jurisdiction	18	43	74	87	76	67	48	67	101	108	95	94	878
Unknown jurisdiction	98	68	88	91	89	77	85	70	129	126	142	178	1,241
No. of complaints	1,840	1,953	2,003	2,260	2,648	1,976	3,532	2,841	3,382	3,806	4,434	5,093	35,768
Basis of complaints resolved													
Race	631	521	526	509	506	530	525	600	675	828	788	979	7,618
National origin	169	166	135	147	142	151	171	241	232	235	289	361	2,439
Sex	514	527	421	289	919	314	862	791	367	377	451	599	6,431
Handicap	1,246	1,114	1,016	1,165	1,254	1,285	1,294	1,902	2,058	2,290	2,754	2,748	20,126
Age	74	122	112	118	153	131	147	455	167	205	220	233	2,137
Other	5	7	7	14	8	7	9	9	19	18	40	41	184
No jurisdiction	14	45	74	86	77	65	51	69	98	107	96	89	871
Unknown jurisdiction	96	78	74	91	97	70	82	76	131	119	147	167	1,228
No. of complaints	2,270	2,265	2,030	2,076	2,795	2,194	2,789	3,206	3,180	3,497	4,180	4,484	34,966

(continued)

Note: More than one basis can be designated for a complaint or compliance or onsite monitoring review.

TABLE 5.4 (continued)
Complaint and Compliance Review Activity by Basis and Fiscal Year

	Number by fiscal year												
	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	Total
Basis of compliance reviews initiated													
Race	78	141	79	117	63	94	66	32	17	16	20	36	759
National origin	32	62	44	65	31	84	37	22	5	15	20	39	456
Sex	57	114	67	125	65	68	77	37	3	15	37	37	702
Handicap	92	134	110	158	99	122	155	74	20	5	13	14	996
Age						1				1		3	5
Other				1	1								2
No. of reviews	152	287	220	288	195	242	247	138	32	41	77	103	2,022
Basis of compliance reviews completed													
Race	19	143	104	121	87	105	89	34	19	10	8	35	774
National origin	8	71	49	72	48	71	63	24	10	4	10	37	467
Sex	23	115	83	130	79	82	78	57	3	6	29	25	710
Handicap	24	154	114	165	103	141	152	105	20	9	10	12	1,009
Age						1				1		2	4
Other		1			2								3
No. of reviews	46	281	252	307	215	280	267	181	35	24	50	84	2,022

(continued)

Note: More than one basis can be designated for a complaint or compliance or onsite monitoring review.

TABLE 5.4 (continued)
Complaint and Compliance Review Activity by Basis and Fiscal Year

	Number by fiscal year												
	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	Total
Basis of onsite monitoring reviews initiated													
Race	7	5	6	1	1	2	2	1		1	26		
National origin	12	5	8	2			1			1			29
Sex	8	14	1	2		1	3		5		2	1	37
Handicap	18	15	11	9	6	10	13	9	13	19	13	2	138
Age													0
Other													0
Number of reviews	33	26	23	13	7	12	15	9	14	20	14	4	190
Basis of onsite monitoring reviews completed													
Race	2	7	12	3	2	1				1	2	2	32
National origin	8	8	9	3	1	1			1	1	2		34
Sex	2	15	7	4	1	1	1	2	3	1	2	4	43
Handicap	1	25	15	11	5	9	11	13	10	16	8	16	140
Age				1									1
Other													0
No. of reviews	9	40	28	17	6	12	11	14	12	17	11	20	197

(continued)

Note: More than one basis can be designated for a complaint or compliance or onsite monitoring review.

TABLE 5.4 (continued)
Complaint and Compliance Review Activity by Basis and Fiscal Year

	Percent by fiscal year												
	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	Total
Basis of complaints received													
Race	28.6	24.6	27.4	22.3	18.7	23.6	17.5	21.8	21.4	22.6	19.2	21.4	21.8
National origin	8.5	8.4	7.4	5.6	5.3	8.1	6.7	6.6	6.9	6.5	7.8	7.2	7.0
Sex	20.5	20.2	14.5	19.0	29.7	11.4	37.5	14.2	10.3	10.7	11.7	14.1	17.4
Handicap	55.9	50.8	53.4	53.3	47.5	60.3	47.5	62.4	65.6	66.5	65.1	61.7	58.6
Age	4.7	6.1	5.5	5.1	6.0	6.3	11.4	7.8	4.6	5.8	5.2	4.8	6.1
Other	0.1	0.3	0.3	0.7	0.3	0.4	0.3	0.4	0.5	0.5	1.0	0.8	0.5
No jurisdiction	1.0	2.2	3.7	3.8	2.9	3.4	1.4	2.4	3.0	2.8	2.1	1.8	2.5
Unknown jurisdiction	5.3	3.5	4.4	4.0	3.4	3.9	2.4	2.5	3.8	3.3	3.2	3.5	3.5
Basis of complaints resolved													
Race	27.8	23.0	25.9	24.5	18.1	24.2	18.8	18.7	21.2	23.7	18.9	21.8	21.8
National origin	7.4	7.3	6.7	7.1	5.1	6.9	6.1	7.5	7.3	6.7	6.9	8.1	7.0
Sex	22.6	23.3	20.7	13.9	32.9	14.3	30.9	24.7	11.5	10.8	10.8	13.4	18.4
Handicap	54.9	49.2	50.0	56.1	44.9	58.6	46.4	59.3	64.7	65.5	65.9	61.3	57.6
Age	3.3	5.4	5.5	5.7	5.5	6.0	5.3	14.2	5.3	5.9	5.3	5.2	6.1
Other	0.2	0.3	0.3	0.7	0.3	0.3	0.3	0.3	0.6	0.5	1.0	0.9	0.5
No jurisdiction	0.6	2.0	3.6	4.1	2.8	3.0	1.8	2.2	3.1	3.1	2.3	2.0	2.5
Unknown jurisdiction	4.2	3.4	3.6	4.4	3.5	3.2	2.9	2.4	4.1	3.4	3.5	3.7	3.5

(continued)

TABLE 5.4 (continued)
Complaint and Compliance Review Activity by Basis and Fiscal Year

	Percent by fiscal year												
	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	Total
Basis of compliance reviews initiated													
Race	51.3	49.1	35.9	40.6	32.3	38.8	26.7	23.2	53.1	39.0	26.0	35.0	37.5
National origin	21.1	21.6	20.0	22.6	15.9	34.7	15.0	15.9	15.6	36.6	26.0	37.9	22.6
Sex	37.5	39.7	30.5	43.4	33.3	28.1	31.2	26.8	9.4	36.6	48.1	35.9	34.7
Handicap	60.5	46.7	50.0	54.9	50.8	50.4	62.8	53.6	62.5	12.2	16.9	13.6	49.3
Age						0.4				2.4		2.9	0.2
Other				0.3	0.5								0.1
Basis of compliance reviews completed													
Race	41.3	50.9	41.3	39.4	40.5	37.5	33.3	18.8	54.3	41.7	16.0	41.7	38.3
National origin	17.4	25.3	19.4	23.5	22.3	25.4	23.6	13.3	28.6	16.7	20.0	44.0	23.1
Sex	50.0	40.9	32.9	42.3	36.7	29.3	29.2	31.5	8.6	25.0	58.0	29.8	35.1
Handicap	52.2	54.8	45.2	53.7	47.9	50.4	56.9	58.0	57.1	37.5	20.0	14.3	49.9
Age						0.4				4.2		2.4	0.2
Other		0.4			0.9								0.1
Basis of onsite monitoring reviews initiated													
Race	21.2	19.2	26.1	7.7	14.3	16.7	13.3		7.1			25.0	13.7
National origin	36.4	19.2	34.8	15.4			6.7			5.0			15.3
Sex	24.2	53.8	4.3	15.4		8.3	20.0		35.7		14.3	25.0	19.5
Handicap	45.5	42.3	52.2	30.8	14.3	16.7	13.3		7.1	5.0	7.1	50.0	27.4
Age													
Other													
Basis of onsite monitoring reviews completed													
Race	22.2	17.5	42.9	17.6	33.3	8.3				5.9	18.2	10.0	16.2
National origin	88.9	20.0	32.1	17.6	16.7	8.3			8.3	5.9	18.2		17.3
Sex	22.2	37.5	25.0	23.5	16.7	8.3	9.1	14.3	25.0	5.9	18.2	20.0	21.8
Handicap	11.1	62.5	53.6	64.7	83.3	75.0	100.0	92.9	83.3	94.1	72.7	80.0	71.1
Age				5.9									0.5
Other													

TABLE 5.5
Complaint and Compliance Review Activity by Jurisdiction, Basis, and Fiscal Year

Complaints received

		Number				Percent		
Jurisdiction	**Basis**	**1993**	**1994**	**1995**		**1993**	**1994**	**1995**
Title 6	Race	448	1,107	993		16.9	21.0	19.9
Title 6	National origin	207	497	402		7.8	9.4	8.1
Title 9	Sex	369	678	592		13.9	12.9	11.9
Title 2	Disability	278	620	1,220		10.5	11.8	24.5
Section 504	Disability	1,693	3,036	2,957		63.8	57.6	59.4
Age	Age	87	206	188		3.3	3.9	3.8
	No jurisdiction	33	168	224		1.2	3.2	4.5
	Unknown jurisdiction	121	230	167		4.6	4.4	3.4
	No. of complaints	2,654	5,273	4,981	12,908			

Complaints resolved

		Number				Percent		
Jurisdiction	**Basis**	**1993**	**1994**	**1995**		**1993**	**1994**	**1995**
Title 6	Race	163	1,128	1,099		17.5	19.6	19.7
Title 6	National origin	86	526	436		9.2	9.1	7.8
Title 9	Sex	133	745	677		14.3	12.9	12.1
Title 2	Disability	113	583	980		12.1	10.1	17.6
Section 504	Disability	615	3,308	3,399		66.1	57.5	60.9
Age	Age	34	215	185		3.7	3.7	3.3
	No jurisdiction	14	161	242		1.5	2.8	4.3
	Unknown jurisdiction	27	302	172		2.9	5.2	3.1
	No. of complaints	931	5,754	5,580	12,265			

(continued)

Note: More than one jurisdiction or basis can be designated for a complaint or compliance review.

TABLE 5.5 (continued)
Complaint and Compliance Review Activity by Jurisdiction, Basis, and Fiscal Year

Compliance reviews initiated

		Number				Percent		
Jurisdiction	**Basis**	**1993**	**1994**	**1995**		**1993**	**1994**	**1995**
Title 6	Race	17	52	46		18.5	32.3	48.4
Title 6	National origin	37	86	51		40.2	53.4	53.7
Title 9	Sex	33	34	12		35.9	21.1	12.6
Title 2	Disability	4	2	3		4.3	1.2	3.2
Section 504	Disability	16	21	7		17.4	13.0	7.4
Age	Age	2	–	–		2.2	0.0	0.0
	No jurisdiction	1	–	–		1.1	0.0	0.0
	Unknown jurisdiction	–	–	1		0.0	0.0	1.1
	No. of reviews	92	161	95	348			

Compliance reviews completed

		Number				Percent		
Jurisdiction	**Basis**	**1993**	**1994**	**1995**		**1993**	**1994**	**1995**
Title 6	Race	3	22	59		6.3	24.2	33.7
Title 6	National origin	24	36	98		50.0	39.6	56.0
Title 9	Sex	15	24	40		31.3	26.4	22.9
Title 2	Disability	1	5	4		2.1	5.5	2.3
Section 504	Disability	9	19	18		18.8	20.9	10.3
Age	Age	1	1	–		2.1	1.1	0.0
	No jurisdiction	–	2	–		0.0	2.2	0.0
	Unknown jurisdiction	–	–	1		0.0	0.0	0.6
	No. of reviews	48	91	175	314			

Note: More than one jurisdiction or basis can be designated for a complaint or compliance review.

TABLE 5.6
Number of Issues Per Complaint or Compliance Review

No. of issues	Complaints	Compliance reviews	Unclassified cases	
0	513	23	5	
1	8,331	129	5	
2	3,943	81	1	
3	2,078	54	2	
4	1,049	71		
5	352	65		
6	275	41		
7	102	21		
8	87	24		
9	45	20		
10	44	53	1	
11	12	6		
12	16	8		
13	15	6		
14	10	11		
15	2	6		
16-20	9	14		
21-25	6	9		
26-40	3	10		
Total number	16,892	652	14	17,558

TABLE 5.7
Jurisdiction/Basis of Issues Designated in Complaints Received by Fiscal Year

Code	Jurisdiction and basis	Number			Percent		
		1993	1994	1995	1993	1994	1995
	Title VI (race/national origin)	**1,232**	**2,672**	**2,398**	**20.7**	**26.6**	**25.3**
01	Black, not Hispanic	717	1,697	1,409	58.2	63.5	58.8
02	Hispanic	241	495	464	19.6	18.5	19.3
03	Asian or Pacific Islander	63	88	114	5.1	3.3	4.8
04	American Indian or Alaskan Native	104	123	131	8.4	4.6	5.5
05	All of the above—class action case	29	72	66	2.4	2.7	2.8
07	Minority white	24	81	93	1.9	3.0	3.9
09	Nonminority white	54	116	121	4.4	4.3	5.0
	Title IX (sex)	**746**	**1,060**	**980**	**12.5**	**10.6**	**10.3**
10	Discrimination against females	659	812	751	88.3	76.6	76.6
11	Maternity discrimination	4	19	11	0.5	1.8	1.1
12	Family status	7	10	10	0.9	0.9	1.0
19	Discrimination against males	76	219	208	10.2	20.7	21.2
	Title II, section 504 (handicap)	**3,708**	**5,603**	**5,368**	**62.3**	**55.8**	**56.6**
20	General handicap	1,049	1,850	1,454	28.3	33.0	27.1
21	Alcohol/drug/chemical dependence	18	48	24	0.5	0.9	0.4
22	Cancer	5	10	3	0.1	0.2	0.1
24	Epilepsy	8	49	28	0.2	0.9	0.5
25	Other health impairments	153	342	350	4.1	6.1	6.5
26	Hard of hearing	374	115	90	10.1	2.1	1.7
28	Total deafness	33	84	70	0.9	1.5	1.3
30	Learning disabled	547	1,184	1,188	14.8	21.1	22.1
32	Mental illness	308	688	606	8.3	12.3	11.3
34	Mental retardation	126	204	258	3.4	3.6	4.8
36	Orthopedic impairment	530	423	378	14.3	7.5	7.0
38	Physical deformity	21	28	37	0.6	0.5	0.7
39	Nonhandicapped	2	3	6	0.1	0.1	0.1
40	Visual impairment	377	158	98	10.2	2.8	1.8
41	Visual—blind	36	44	72	1.0	0.8	1.3

(continued)

TABLE 5.7 (continued)
Jurisdiction/Basis of Issues Designated in Complaints Received by Fiscal Year

Code	Jurisdiction and basis	Number 1993	1994	1995		Percent 1993	1994	1995
	Title II, section 504 (handicap) (cont.)							
43	Speech impairment	22	58	57		0.6	1.0	1.1
44	AIDS/HIV positive	0	0	2		0.0	0.0	0.0
45	Attention deficit disorder (ADD)	10	27	66		0.3	0.5	1.2
46	Attention deficit hyperactivity disorder (ADHD)	3	9	85		0.1	0.2	1.6
69	Other handicapped basis	86	279	496		2.3	5.0	9.2
	Age	**91**	**265**	**257**		**1.5**	**2.6**	**2.7**
49	Age discrimination (too young)	11	44	35		12.1	16.6	13.6
50	Age discrimination (too old)	80	221	222		87.9	83.4	86.4
	Multiple	**14**	**1**	**11**		**0.2**	**0.0**	**0.1**
90	More than five applicable bases	14	1	11		100.0	100.0	100.0
	Other	**165**	**435**	**476**		**2.8**	**4.3**	**5.0**
97	Other OCR basis	11	55	75		6.7	12.6	15.8
98	No OCR basis	24	131	189		14.5	30.1	39.7
99	Basis not determined	130	249	212		78.8	57.2	44.5
	Total	**5,956**	**10,036**	**9,490**	**25,482**			

TABLE 5.8
Jurisdiction/Basis of Issues Designated in Compliance Reviews Initiated by Fiscal Year

		Number				Percent		
Code	Jurisdiction and basis	1993	1994	1995		1993	1994	1995
	Title VI (race/national origin)	**303**	**798**	**525**		**49.9**	**74.2**	**90.5**
01	Black, not Hispanic	28	164	72		9.2	20.6	13.7
02	Hispanic	103	207	150		34.0	25.9	28.6
03	Asian or Pacific Islander	28	76	52		9.2	9.5	9.9
04	American Indian or Alaskan Native	68	115	59		22.4	14.4	11.2
05	All of the above—class action case	64	223	177		21.1	27.9	33.7
07	Minority white	11	12	15		3.6	1.5	2.9
09	Nonminority white	1	1	0		0.3	0.1	0.0
	Title IX (sex)	**227**	**204**	**46**		**37.4**	**19.0**	**7.9**
10	Discrimination against females	222	204	46		97.8	100.0	100.0
11	Maternity discrimination	5	0	0		2.2	0.0	0.0
	Title II, section 504 (handicap)	**35**	**61**	**6**		**5.8**	**5.7**	**1.0**
20	General handicap	15	49	3		42.9	80.3	50.0
28	Total deafness	1	0	0		2.9	0.0	0.0
30	Learning disabled	3	3	2		8.6	4.9	33.3
34	Mental retardation	0	6	0		0.0	9.8	0.0
36	Orthopedic impairment	2	0	0		5.7	0.0	0.0
38	Physical deformity	1	1	1		2.9	1.6	16.7
41	Visual—blind	1	0	0		2.9	0.0	0.0
69	Other handicapped basis	12	2	0		34.3	3.3	0.0
	Age	**6**	–	–		**1.0**	**0.0**	**0.0**
49	Age discrimination (too young)	1	0	0		16.7	0.0	0.0
50	Age discrimination (too old)	5	0	0		83.3	0.0	0.0
	Other	**36**	**12**	**3**		**5.9**	**1.1**	**0.5**
97	Other OCR basis	36	12	2		100.0	100.0	66.7
99	Basis not determined	0	0	1		0.0	0.0	33.3
	Total	**607**	**1,075**	**580**	**2,262**			

TABLE 5.9
Issues Designated in Complaints Received by Fiscal Year

Issue code	Description	Number of issues by year 1993	1994	1995	Percent of issues by year 1993	1994	1995
00000	**Service issue not related to education**	**9**	**5**	**13**	**0.1**	**0.0**	**0.1**
S0000	**Unspecified education-related service**	**121**	**383**	**248**	**2.0**	**3.8**	**2.6**
S1000-1399	**Admission to education program**	**296**	**408**	**464**	**4.9**	**4.1**	**4.9**
S1100-1199	Recruitment for enrollment	16	11	10	5.4	2.7	2.2
S1200-1299	Application for admission	86	107	137	29.1	26.2	29.5
S1300-1399	Selection for enrollment	182	244	266	61.5	59.8	57.3
S1000-1099	Unspecified or other admission issue	12	46	51	4.1	11.3	11.0
S2000-2699	**Assignment of students**	**1,044**	**1,989**	**2,053**	**17.4**	**19.8**	**21.6**
S2100-2199	Assignment of schools	55	98	88	5.3	4.9	4.3
S2200-2299	Assignment within schools	39	85	68	3.7	4.3	3.3
S2201	*—criteria for assignment within school*	*22*	*25*	*17*	*56.4*	*29.4*	*25.0*
S2202	*—tracking*	*5*	*10*	*6*	*12.8*	*11.8*	*8.8*
S2203	*—ability grouping*	*9*	*26*	*7*	*23.1*	*30.6*	*10.3*
S2205	*—underrepresentation in math and science*	-	-	-	*0.0*	*0.0*	*0.0*
S2300-2399	Special programs for gifted and talented students	40	88	100	3.8	4.4	4.9
S2400-2499	Assignment of students with physical/mental impairments	815	1,609	1,620	78.1	80.9	78.9
S2402	*—evaluation/classification*	*226*	*439*	*361*	*27.7*	*27.3*	*22.3*
S2403	*—placement/referral*	*225*	*437*	*388*	*27.6*	*27.2*	*24.0*
S2404	*—educational setting*	*120*	*195*	*217*	*14.7*	*12.1*	*13.4*
S2405	*—Individualized Education Plan (IEP) Services*	*153*	*327*	*429*	*18.8*	*20.3*	*26.5*
S2408	*—overrepresentation in special education*	*1*	*3*	*5*	*0.1*	*0.2*	*0.3*
S2500-2599	Assignment of students whose primary or home language is other than English	80	64	94	7.7	3.2	4.6
S2600-2699	Special education for LEP students	13	42	78	1.2	2.1	3.8
S2000-2099	Unspecified or other assignment of students	2	3	5	0.2	0.2	0.2
S3000-3499	**Program service**	**1,700**	**1,466**	**1,342**	**28.3**	**14.6**	**14.2**
S3100-3199	Staffing	63	98	141	3.7	6.7	10.5
S3200-3299	Service for students with physical/mental impairments	1,495	1,112	979	87.9	75.9	73.0
S3201	*--related aids and services/auxiliary aids*	*293*	*521*	*468*	*19.6*	*46.9*	*47.8*
S3202	*--program accessibility*	*1,069*	*326*	*231*	*71.5*	*29.3*	*23.6*
S3203	*--costs related to provision of adequate or appropriate program services*	*40*	*57*	*33*	*2.7*	*5.1*	*3.4*

(continued)

TABLE 5.9 (continued)
Issues Designated in Complaints Received by Fiscal Year

Issue code	Description	Number of issues by year 1993	1994	1995		Percent of issues by year 1993	1994	1995
S3204	*--physical inaccessibility*	*10*	*8*	*36*		*0.7*	*0.7*	*3.7*
S3200, 3299	*--unspecified and other services for students with impairments issue*	*83*	*200*	*211*		*5.6*	*18.0*	*21.6*
S3300-3399	Facilities and equipment used in education programs	62	95	81		3.6	6.5	6.0
S3000-3099	Unspecified or other program services issue	1	16	27		0.1	1.1	2.0
S4000-4399	**Program requirements**	**361**	**834**	**888**		**6.0**	**8.3**	**9.4**
S4100-4199	Curriculum	51	137	123		14.1	16.4	13.9
S4200-4299	Academic adjustments	129	261	359		35.7	31.3	40.4
S4300-4399	Academic evaluation/grading	178	424	380		49.3	50.8	42.8
S4000-4099	Unspecified or other program requirements issues	3	12	26		0.8	1.4	2.9
S5000-5599	**Support services**	**129**	**261**	**310**		**2.1**	**2.6**	**3.3**
S5200-5299	Counseling and tutoring	34	69	86		26.4	26.4	27.7
S5400-5499	Employment-related services	19	38	31		14.7	14.6	10.0
S6000-6299	**Extracurricular activities**	**395**	**357**	**359**		**6.6**	**3.6**	**3.8**
S6100-6199	Athletics	322	264	256		81.5	73.9	71.3
S6200-6299	Student organizations/activities	65	78	90		16.5	21.8	25.1
S6000-6099	Unspecified or other extracurricular activities issues	8	15	13		2.0	4.2	3.6
S7000-7499	**Student/beneficiary treatments**	**1,058**	**2,516**	**2,388**		**17.6**	**25.1**	**25.2**
S7100-7199	Discipline	395	1,015	920		37.3	40.3	38.5
S7200-7299	Awards and honors	12	37	24		1.1	1.5	1.0
S7300-7399	Student rights	589	1,232	1,091		55.7	49.0	45.7
S7302	*--harrassment*	*250*	*558*	*473*		*42.4*	*45.3*	*43.4*
S7304	*--sexual harrassment*	*86*	*168*	*161*		*14.6*	*13.6*	*14.8*
S7305	*--racial harrassment*	*4*	*7*	*35*		*0.7*	*0.6*	*3.2*
S7400-7499	Parent rights	50	127	191		4.7	5.0	8.0
S7000-7099	Unspecified or other student/beneficiary treatments	12	105	162		1.1	4.2	6.8
S8000-8699	**Service-related administration**	**292**	**449**	**372**		**4.9**	**4.5**	**3.9**
S8100-8199	Informational requirements	54	60	41		18.5	13.4	11.0
S8200-8299	Procedural requirements	217	341	282		74.3	75.9	75.8
S8300-8399	Remedial action plans	1	1	1		0.3	0.2	0.3
S8500-8599	Distribution of administrative funds	8	11	15		2.7	2.4	4.0
S8600-8699	Methods of administration	6	14	19		2.1	3.1	5.1
E0000-E5499	**Education-related employment**	**596**	**1,361**	**1,046**		**9.9**	**13.6**	**11.0**
E1000-1399	Hiring	103	278	261		17.3	20.4	25.0
E2000-2299	Assignment of employees	108	182	125		18.1	13.4	12.0
	Total	**6,001**	**10,029**	**9,483**	**25513**	**100.0**	**100.0**	**100.0**

TABLE 5.10
Issues Designated in Initiated Compliance Reviews by Fiscal Year

Issue code	Description	Number of issues by year 1993	1994	1995	Percent of issues by year 1993	1994	1995
S0000	**Unspecified education-related service**	**0**	**0**	**3**	**0.0**	**0.0**	**0.5**
S1000-1399	**Admission to education program**	**23**	**91**	**24**	**3.8**	**8.5**	**4.1**
S1100-1199	Recruitment for enrollment	1	10	2	4.3	11.0	8.3
S1200-1299	Application for admission	9	45	4	39.1	49.5	16.7
S1300-1399	Selection for enrollment	11	33	18	47.8	36.3	75.0
S1000-1099	Unspecified or other admission to education issue	2	3	-	8.7	3.3	0.0
S2000-2699	**Assignment of students**	**311**	**637**	**447**	**51.2**	**59.3**	**77.1**
S2100-2199	Assignment of schools	1	3	1	0.3	0.5	0.2
S2200-2299	Assignment within schools	13	33	37	4.2	5.2	8.3
S2201	*—criteria for assignment within school*	*8*	*8*	*4*	*61.5*	*24.2*	*10.8*
S2202	*—tracking*	*1*	*2*	*6*	*7.7*	*6.1*	*16.2*
S2203	*—ability grouping*	*3*	*3*	*6*	*23.1*	*9.1*	*16.2*
S2205	*—underrepresentation in math and science*	-	*11*	*13*	*0.0*	*33.3*	*35.1*
S2300-2399	Special programs for gifted and talented students	5	28	30	1.6	4.4	6.7
S2400-2499	Assignment of students with physical or mental impairments	20	112	34	6.4	17.6	7.6
S2402	*—evaluation/classification*	*3*	*29*	*6*	*15.0*	*25.9*	*17.6*
S2403	*—placement/referral*	*7*	*32*	*6*	*35.0*	*28.6*	*17.6*
S2404	*—educational setting*	*3*	*9*	*6*	*15.0*	*8.0*	*17.6*
S2405	*—Individualized Education Plan (IEP) services*	*1*	*3*	*3*	*5.0*	*2.7*	*8.8*
S2408	*—overrepresentation in special education*	*1*	*19*	*9*	*5.0*	*17.0*	*26.5*
S2500-2599	Assignment of students whose primary or home language is other than English	236	384	273	75.9	60.3	61.1
S2600-2699	Special education for LEP students	36	72	70	11.6	11.3	15.7
S2000-2099	Unspecified or other assignment of students	-	5	2	0.0	0.8	0.4
S3000-3499	**Program service**	**19**	**24**	**28**	**3.1**	**2.2**	**4.8**
S3100-3199	Staffing	8	10	13	42.1	41.7	46.4
S3200-3299	Service for students with physical/mental impairments	8	9	3	42.1	37.5	10.7
S3201	*—related aids and services/auxiliary aids*	*1*	*2*	*1*	*12.5*	*22.2*	*33.3*
S3202	*—program accessibility*	*7*	*6*	*2*	*87.5*	*66.7*	*66.7*
S3200, 3299	*—unspecified and other services for students with impairments issue*	-	*1*	-	*0.0*	*11.1*	*0.0*
S3300-3399	Facilities and equipment used in education programs	3	4	12	15.8	16.7	42.9

(continued)

TABLE 5.10 (continued)
Issues Designated in Initiated Compliance Reviews by Fiscal Year

Issue code	Description	Number of issues by year 1993	1994	1995		Percent of issues by year 1993	1994	1995
S4000-4399	**Program requirements**	**11**	**52**	**14**		**1.8**	**4.8**	**2.4**
S4100-4199	Curriculum	3	4	5		27.3	7.7	35.7
S4200-4299	Academic adjustments	3	16	3		27.3	30.8	21.4
S4300-4399	Academic evaluation/grading	5	27	4		45.5	51.9	28.6
S4000-4099	Unspecified or other program requirements issues	-	5	2		0.0	9.6	14.3
S5000-5599	**Support services**	**1**	**12**	**11**		**0.2**	**1.1**	**1.9**
S5200-5299	Counseling and tutoring	1	10	7		100.0	83.3	63.6
S5400-5499	Employment-related services	-	-	2		0.0	0.0	18.2
S6000-6299	**Extracurricular activities**	**204**	**175**	**9**		**33.6**	**16.3**	**1.6**
S6100-6199	Athletics	203	174	8		99.5	99.4	88.9
S7000-7499	**Student/beneficiary treatments**	**26**	**39**	**25**		**4.3**	**3.6**	**4.3**
S7100-7199	Discipline	15	17	1		57.7	43.6	4.0
S7200-7299	Awards and honors	-	-	2		0.0	0.0	8.0
S7300-7399	Student rights	6	21	20		23.1	53.8	80.0
S7302	*—harrassment*	*3*	*6*	*6*		*50.0*	*28.6*	*30.0*
S7304	*—sexual harrassment*	*2*	*4*	*5*		*33.3*	*19.0*	*25.0*
S7305	*—racial harrassment*	-	*5*	*6*		*0.0*	*23.8*	*30.0*
S7400-7499	Parent rights	3	1	2		11.5	2.6	8.0
S7000-7099	Unspecified or other student/beneficiary treatments	2	-	-		7.7	0.0	0.0
S8000-8699	**Service-related administration**	**12**	**40**	**11**		**2.0**	**3.7**	**1.9**
S8100-8199	Informational requirements	6	18	4		50.0	45.0	36.4
S8200-8299	Procedural requirements	5	9	5		41.7	22.5	45.5
S8300-8399	Remedial action plans	-	-	-		0.0	0.0	0.0
S8500-8599	Distribution of administrative funds	-	1	-		0.0	2.5	0.0
E0000-E5499	**Education-related employment**	**-**	**5**	**8**		**0.0**	**0.5**	**1.4**
E1000-1399	Hiring	-	2	-		0.0	40.0	0.0
E2000-2299	Assignment of employees	-	2	-		0.0	40.0	0.0
	Total	**607**	**1,075**	**580**	**2,262**	**100.0**	**100.0**	**100.0**

TABLE 5.11
Resolutions of Issues Designated in Complaints and Compliance Reviews by Fiscal Year

Resolved complaints

		All institutions				*Elementary and secondary schools*			
Code	***Description of resolution***	***1993***	***1994***	***1995***		***1993***	***1994***	***1995***	
***	Referrals	101	608	632		45	329	349	
***	Early closures (e.g. incomplete, untimely, lack of jursidiction)	426	2,374	2,395		192	1,285	1,270	
***	Closure at evaluation stage	14	295	328		13	167	170	
***	Allegations handled through another process (e.g. litigation, grievance procedures, compliance review...)	4	1,356	930		4	969	664	
29	Under compliance review	-	179	10		-	156	10	
***	Discontinued (e.g. because of death or lack of cooperation of complainant)	22	361	424		18	247	320	
***	Recipient changed before enforcement	1,166	3,122	3,649		914	2,534	2,941	
34	Allegations resolved by recipient	7	749	944		6	636	811	
35	Investigated and resolved by another agency	-	53	71		-	46	59	
36	Early complaint resolution: OCR facilitated	23	591	504		18	517	403	
37	Agreement for corrective action	1,136	1,724	2,127		890	1,330	1,665	
38	Agreement for corrective action with violation corrected LOF	5	3			5	3		
***	No change required	390	2,959	2,585		259	2,174	1,769	
40	Insufficient factual basis for allegations	33	517	573		28	358	347	
41	Insufficient evidence for finding of violation	167	1,121	1,242		107	763	805	
42	No violation letter of finding issued	172	769	367		112	608	320	
***	Resolutions after letter of finding of violation issued	12	30	62		9	18	51	
44	Post-LOF settlement	12	17	17		9	8	9	
45	Settlement after administrative proceedings initiated	-	2	5		-	1	2	
46	Administrative proceedings resolution	-	5	2		-	3	2	
47	Referred to DOJ for enforcement	-	6	38		-	6	38	
	Total	2,135	11,105	11,005	24,245	1,454	7,723	7,534	16,711

TABLE 5.11 (continued)
Resolutions of Issues Designated in Complaints and Compliance Reviews by Fiscal Year

Completed compliance reviews

		All institutions				*Elementary and secondary schools*			
Code	***Description of resolution***	***1993***	***1994***	***1995***		***1993***	***1994***	***1995***	
***	Referrals	–	–	40		–	–	40	
***	Allegations handled through another process (e.g., litigation, grievenace procedures, compliance review...)	–	–	8		–	–	8	
***	Discontinued (e.g. because of death or lack of cooperation of complainant)	–	–	4		–	–	4	
***	Recipient changed before enforcement	270	406	946		226	320	790	
34	Allegations resolved by recipient	–	–	1		–	–	1	
35	Investigated and resolved by another agency	–	4	18		–	4	18	
36	Early complaint resolution: OCR facilitated	–	1	–		–	1	–	
37	Agreement for corrective action	41	81	296		40	51	273	
38	Agreement for corrective action with violation corrected LOF	229	320	631		186	264	498	
***	**No change required**	**17**	**124**	**278**		**9**	**85**	**116**	
40	Insufficient factual basis for allegations	–	–	3		–	–	3	
41	Insufficient evidence for finding of violation	17	71	194		9	49	97	
42	No violation letter of finding issued	–	53	81		–	36	16	
***	**Resolutions after letter of finding of violation issued**	–	**2**	–		–	**2**	–	
44	Post-LOF settlement	–	2	–		–	2	–	
	Total	**287**	**532**	**1,276**	**2,095**	**235**	**407**	**958**	**1,600**

(continued)

Source: Department of Education Complaints Database ("CIS2").

TABLE 5.11 (continued)
Resolutions of Issues Designated in Complaints and Compliance Reviews by Fiscal Year

Resolved complaints

Code	Description of resolution	Number by fiscal year 1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	Total
***	Referrals (lack of jurisdiction)	122	132	178	194	207	192	225	250	204	236	282	336	2,558
***	Early closures (e.g. incomplete, untimely, no jurisdiction)	480	472	366	350	906	581	606	678	682	814	1,218	1,236	8,389
***	Closure at evaluation stage	74	86	61	54	78	69	78	97	153	224	311	476	1,761
***	Allegations handled through another agency	46	50	17	65	59	57	66	70	132	152	173	169	1,056
***	Discontinued (e.g. because of lack of cooperation of complainant)	35	30	11	24	24	13	22	36	30	38	40	50	353
***	Recipient changed before enforcement	653	754	635	653	942	607	1,038	1,145	1,111	1,125	1,155	1,151	10,969
92	Complainant achieves change [34, ECR 36]	194	220	244	295	268	286	303	364	485	445	531	551	4,186
93	Remedial action completed [38, see note]	149	267	161	115	147	70	149	132	88	74	66	65	1,483
94	Remedial action plan agreed on [37]	307	260	222	237	524	250	584	644	537	599	556	533	5,253
96	Change mediated by another agency (Age) [35]	3	7	8	6	3	1	2	5	1	7	2	2	47
***	No change required	709	707	685	699	574	669	754	923	867	906	999	1,063	14,808
85	Complaint withdrawn w/o complainant benefit [39]	82	102	102	90	75	137	100	90	121	92	125	116	1,232
91	Investigation found no violation [42]	627	605	583	608	498	532	654	833	746	814	874	947	8,321
97	Withdrawn after other agency's mediation (Age)				1	1								2
***	Resolutions after letter of finding of violation issued	151	29	12	6	5	6		7	1	2	2	3	224
93	Remedial action completed [44, see note]	149	29	12	5	5	6		7	1	1	2	3	220
95	DOE enforcement action completed	2			1						1			4
	Total	2,270	2,260	1,965	2,045	2,795	2,194	2,789	3,206	3,180	3,497	4,180	4,484	34,865

(continued)

TABLE 5.11 (continued)
Resolutions of Issues Designated in Complaints and Compliance Reviews by Fiscal Year

Completed compliance reviews

Code	Description of resolution	Number by fiscal year 1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	Total
***	Closure at evaluation stage	2	2	1	4	7	1	1	1		2	1	5	27
***	Allegations handled through another agency			1		2								3
***	Recipient changed before enforcement	28	197	163	218	143	206	196	119	19	8	29	54	1,380
93	Remedial action completed [38,see note]	6	35	30	24	22	20	12	6			2	2	159
94	Remedial action plan agreed on [37]	22	162	133	194	121	186	184	113	19	8	27	52	1,221
***	No change required	16	82	59	82	58	67	68	56	11	12	20	24	555
91	Investigation found no violation [42]	16	82	59	82	58	67	68	56	11	12	20	24	555
***	Resolutions after letter of finding of violation issued					1	1		2					4
93	Remedial action completed [44, see note]								2					2
95	DOE enforcement action completed					1	1							2
	Total	46	281	224	304	210	278	265	178	30	22	50	83	1,971

TABLE 5.11 (continued)
Resolutions of Issues Designated in Complaints and Compliance Reviews by Fiscal Year

Completed onsite monitoring reviews

		Number by fiscal year												
Code	***Description of resolution***	***1982***	***1983***	***1984***	***1985***	***1986***	***1987***	***1988***	***1989***	***1990***	***1991***	***1992***	***1993***	***Total***
***	Closure at evaluation stage		1		1		1	1			4			
***	Recipient changed before enforcement	3	26	23	16	4	8	7	11	2	13	7	10	130
93	Remedial action completed [38, see note]	1	4	6	8	1	6	2	1	2	10	4	6	51
94	Remedial action plan agreed on [37]	2	22	17	8	3	2	5	10		3	3	4	79
***	No change required	6	12	5	1	2	3	4	3	9	3	4	10	62
91	Investigation found no violation [42]	6	12	5	1	2	3	4	3	9	3	4	10	62
***	Resolutions after letter of finding of violation issued		1											1
93	Remedial action completed [44, see note]		1											1
	Total	9	40	28	17	6	12	11	14	12	17	11	20	197

*The ACIMS database includes only the closure code for the latest among the issues to be resolved, unlike the CIS database which has a resolution code for each issue. Note further that resolution codes differ between the two databases. The ACIMS resolution codes grouped in the above categories are shown below. Similar CIS resolution codes are shown in brackets.

Referrals (no jurisdiction)
75, 77, 79 No jurisdiction over institution or subject, referred [10-14]
Early closures (e.g., incomplete, untimely, no jurisdiction)
76, 78, 80 No jurisdiction over institution or subject, no referral [19, 20]
81 Complaint no timely [17, 18]
82 Complaint not completed [16]
Closure at evaluation stage
90 Complaint patently frivolous [22]
89 Other administrative closure
Allegations handled through another agency
83 Jurisdiction, being processed by another agency [28]
87 Transferred to another agency
Discontinued (e.g., because of lack of cooperation of complainant)
84 Complainant cannot be located
86 Complainant refuses to cooperate [32]
No change required
85 Complaint withdrawn w/o complainant benefit [39]
91 Investigation found no violation [42]
97 Withdrawn after other agency's mediation (Age)
Recipient changed before enforcement
92 Complainant achieves change [34, ECR 36]
93 Remedial action completed [38, 44]
94 Remedial action plan agreed on [37]
96 Change mediated by another agency (age complaints) [35]
Possible resolutions after letter of finding of violation issued
93 Remedial action completed [38, 44]
95 DOE enforcement action completed
Code 93 includes remedial or corrective actions completed either before or after the issuance of a letter of findings or notification of civil rights compliance status to a funding agency. These cases are included here as "Resolutions after letter of finding of violation issued" when other information indicates that a violation was found or was not corrected at the time of the letter of finding. Otherwise they are included under "recipient changed before enforcement."

TABLE 5.12
Complaints and Compliance Review Activity by Region and by Fiscal Year

Complaints received

Region	1993	1994	1995	Total
01	197	367	324	888
02	174	367	373	914
03	492	542	487	1,521
04	301	993	834	2,128
05	131	500	426	1,057
06	241	594	589	1,424
07	117	340	442	899
08	186	427	336	949
09	636	600	664	1,900
10	75	307	286	668
15	104	236	220	560
Total	2,654	5,273	4,981	12,908

Complaints resolved

Region	1993	1994	1995	Total
01	64	400	468	932
02	44	383	420	847
03	91	710	662	1,463
04	76	996	969	2,041
05	34	538	464	1,036
06	19	691	609	1,319
07	25	371	446	842
08	68	461	344	873
09	460	653	663	1,776
10	15	323	281	619
15	35	228	254	517
Total	931	5,754	5,580	12,265

Compliance reviews initiated

Region	1993	1994	1995	Total
01	7	7	6	20
02	7	13	2	22
03	9	9	2	20
04	9	23	14	46
05	9	4	6	19
06	8	14	12	34
07	7	19	0	26
08	17	26	12	55
09	8	30	32	70
10	6	12	8	26
15	5	4	1	10
Total	92	161	95	348

Compliance reviews resolved

Region	1993	1994	1995	Total
01	3	3	15	21
02	2	2	13	17
03	4	9	5	18
04	3	15	29	47
05	4	6	8	18
06	1	4	20	25
07	4	6	17	27
08	17	18	17	52
09	6	14	35	55
10	3	10	13	26
15	1	4	3	8
Total	48	91	175	314

TABLE 5.13
Issues Raised in Complaints in CIS Database for 1993–1995 by Region

Region	I	II	III	IV	V	VI	VII	VIII	IX	X	XV
Assignment of students whose primary language is not English	22	12	15	13	8	27	8	34	74	21	4
Assignment of LEP students to special eduation	13	5	14	13	–	3	2	17	20	46	–
Total LEP	35	17	29	26	8	30	10	51	94	67	4
Assignment within schools	15	14	28	37	4	17	16	4	40	8	9
Ability grouping	2	3	21	7	–	1	–	3	4	–	2
Tracking	4	2	1	4	1	1	–	–	7	–	1
Ability grouping & tracking	6	5	22	11	1	2	n	3	11	–	3
Assignment to gifted and talented programs	13	12	58	40	5	32	20	6	29	5	8
Assignment to special education based on race	20	12	58	40	5	32	20	6	29	5	8
Assignment to special education based on learning disability	116	41	100	118	32	204	66	28	142	11	145
Assignment to special education based on mental retardation	14	1	22	58	20	26	18	–	58	2	44

Source: U.S. Department of Education, Office for Civil Rights, Case Information System Database.

TABLE 5.14
Issues Raised in Compliance Reviews in CIS Database for 1993–1995 by Region

Region	I	II	III	IV	V	VI	VII	VIII	IX	X	XV
Assignment of students whose primary language is not English	49	36	5	35	50	65	31	368	175	54	25
Assignment of LEP students to special eduation	8	10	8	5	3	35	–	91	18	–	–
Total LEP	57	46	13	40	53	100	31	459	193	54	25
Assignment within schools	–	11	1	6	3	7	7	–	45	–	3
Ability grouping	–	2	–	3	1	2	–	–	4	–	–
Tracking	–	3	–	–	–	–	–	–	5	–	1
Ability grouping & tracking	–	5	–	1	1	2	–	–	9	–	1
Assignment to gifted and talented programs	–	6	–	3	3	28	9	–	12	–	–
Assignment to special education based on race	2	16	8	6	6	18	6	52	6	1	2
Assignment to special education based on learning disability	–	1	–	–	–	–	–	–	–	–	2
Assignment to special education based on mental retardation	–	–	–	–	–	–	–	–	–	–	–

Source: U.S. Department of Education, Office for Civil Rights, Case Information System Database.

Chapter 6

Findings and Recommendations

The U.S. Commission on Civil Rights (Commission) finds that, in general, the U.S. Department of Education, Office for Civil Rights (OCR) operates a highly developed civil rights implementation, compliance, and enforcement program that should serve as a model for other civil rights agencies. The Commission is aware that certain initiatives or activities of OCR are under review by various congressional committees, and the Commission's recommendations take no position on OCR's substantive initiatives and activities. However, the Commission has specific recommendations for further improving and strengthening OCR's operations. Overall, the Commission finds that the U.S. Department of Education (DOEd) should create greater interaction and cohesion of objectives among the various program offices and with OCR. This interoffice cooperation would help to promote DOEd's mission to ensure equal access to education and to promote educational excellence throughout the Nation. These offices should work closely and efficiently together as a function of DOEd's firm commitment to all students. Moreover, OCR headquarters should provide better and additional guidance to regional staff particularly relating to new and innovative practices and the development and dissemination of technical assistance materials.

I. General

Finding: The Federal Role

Although State and local governments always have been the principal providers of public education, the Federal Government has had a strong interest in education. Federal involvement in the promotion of equal educational opportunity has a constitutional basis in the equal protection clause of the 14th Amendment. Federal involvement in education more generally is believe by many commentators (though disputed by other) to have a constitutional basis derived from the power given to Congress in article 1, section 8 of the Constitution to provide for the "common defense and general welfare of the United States.[1] Because of this delegated power, the Federal Government has a vital and meaningful role to play along with State and local education agencies. Specifically, the Federal Government is an ideal source for technical and financial assistance, coordination, oversight, and leadership.[2]

For example, Federal intervention by the courts has secured improvements in education and educational opportunities for the Nation's students.[3] Federal initiatives have prompted efforts to raise national education standards.[4] Numerous Federal education programs have provided assistance to over 60 million students from preschool to postdoctoral levels,[5] as well as their parents, teachers, professors, and the public generally. Many of these programs have created a pool of information and technical assistance to improve the education provided to students of all ages.

DOEd's programs have supported a number of nationwide information clearinghouses, such as the National Information Center for Children and Youth with Disabilities; the HEATH Resource Center, a national clearinghouse on postsecondary education for individuals with disabilities; the National Rehabilitation Information Center; the National Clearinghouse for Professions in Special Education; the ERIC Clearinghouse on Disabilities and Gifted Education; and the National Clearinghouse on Bilingual Education.[6] DOEd's programs also have supported numerous educational research and reporting projects, such as the 1966 Coleman Report on educational achievement,[7] the nationwide study on education reported in the 1983 *A Nation at Risk*,[8] and the ongoing statistical compilation and reporting conducted by the National Center on Education Statistics.[9]

Federal programs also have supported many efforts to improve education. Before World War II, the Smith-Hughes Act of 1917 provided support for vocational education at the elementary and secondary level.[10] World War II prompted several Federal education programs, including the Lanham Act of 1940 authorizing Federal aid to schools in localities affected by the defense effort, and the Serviceman's Readjustment Act of 1944,

[1] *See* chap. 2, p. 10.

[2] *See* chap. 2, p. 10.
[3] *See* chap. 2, pp. 12-16.
[4] *See* chap. 2, pp. 20-23.
[5] *See* chap. 3, p. 25.
[6] *See* chap. 3, pp. 24-27.
[7] *See* chap. 2, p. 16.
[8] *See* chap. 2, p. 20.
[9] *See* chap. 3, p. 42.
[10] *See* chap. 2, p. 11.

popularly known as the GI Bill, providing financial aid to veterans attending college.[11]

Although contemporary federally funded programs, like Title I of the Elementary and Secondary Education Act of 1965, have received scrutiny over the years due to slow improvements, excessive testing, and rigid regulations, Congress has continued to fund Title I because of its success with improving the achievement levels of poor and minority children. In addition, many policymakers have recognized that the population of poor students, especially from minority backgrounds, will increase by the end of the century; thus, increasing the need for investment in their success through continued Title I funding.[12]

Recommendation: The Federal Role

The Federal Government has long promoted equal opportunity for a quality education and worked to ensure nondiscrimination. The Federal Government should continue to enforce the laws to provide an equal opportunity to quality education.

Finding: Nexus Between Civil Rights and Education within the Department of Education

OCR and the Office of Special Education and Rehabilitative Services (OSERS) have signed a memorandum of understanding that explains the relationship between the two offices with respect to the enforcement of section 504, the IDEA, and the ADA. The memorandum of understanding between OCR and OSERS recognizes that the two offices can engage in joint technical assistance activities, such as developing materials and training packages, and participating in conferences. The memorandum of understanding, however, reflects OCR's organizational structure prior to its 1996 reorganization. Because of the reorganization, the memorandum of understanding is now unclear as to which OCR staff member serves as the coordinator with OSERS.

OCR has little formal communication with the other program offices within DOEd. The interaction between OCR and these offices is limited primarily to reviewing regulations and policies that circulate routinely throughout DOEd.[13] With few exceptions, OCR does not participate with DOEd's grant offices in establishing the criteria used to award Federal funds, or in ensuring that equal educational opportunity principles are incorporated in that criteria.

Moreover, DOEd does not require the program offices to incorporate OCR's civil rights compliance and enforcement priority issues into their program activities. Although OCR staff members work occasionally with the Office of Educational Research and Improvement's (OERI) regional laboratories in negotiating resolutions and in developing technical assistance materials, this relationship is not consistently developed or utilized. Furthermore, OCR does not routinely work with OERI to design national research studies to assess students in areas that may indicate potential barriers to equal educational opportunities. OCR has little contact with the other program offices except when their statutory duties coincide, such as its relationship with the Office of Elementary and Secondary Education (OESE) regarding magnet school assistance programs.

Recommendation: Nexus Between Civil Rights and Education within the Department of Education

The Commission commends OCR and OSERS for creating a memorandum of understanding to delineate their joint responsibilities. The exchange of information and the opportunity to conduct joint technical assistance activities is useful and beneficial to both offices. This cooperation allows OCR to improve its understanding of education issues, and allows OSERS to improve its understanding of civil rights principles. It also provides informational resources that assist in developing remedies and designing alternative, nondiscriminatory education practices for schools.

Whenever appropriate OCR should continue its interaction with DOEd's program offices.

The Commission encourages OCR to develop formal memoranda of understanding with other DOEd program, grant, and research offices such as the Office of Bilingual Education and Minority Languages Affairs (OBEMLA), OESE, and OERI. These memoranda of understanding would enhance OCR's ability to conduct technical assistance in areas such as *Lau* compliance, ability grouping, and gender equity. In addition, the memorandum of understanding between OCR and OERI could contain language encouraging the educational research community to develop critical and cogent research priorities that analyze information and data related to civil rights implementation, compliance, and enforcement.

Moreover, memoranda of understanding would facilitate greater coordination between the program offices and OCR, and ensure that DOEd's program offices incorporate civil rights and equal educational opportunity

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[11] *See* chap. 2, pp. 11-12.
[12] *See* chap. 2, p. 23.
[13] *See* chap. 5, pp. 165-68.

principles into their grant award processes. OCR and grant offices should work closely to develop criteria to award Federal funds to recipients beyond the paper assurances already signed by recipients. Program offices should give priority to recipients who demonstrate a strong commitment to compliance with civil rights statutes. OCR's enforcement priorities should be reflected throughout DOEd.

OCR's program legal team staff should continue to refer school districts to desegregation assistance centers and OERI regional laboratories for assistance in developing nondiscriminatory education practices. This referral and exchange of information should be a routine part of OCR's enforcement activities and resolution negotiations. This exchange should include the development and dissemination of technical assistance materials to school districts and to participants in education conferences and workshops.

Finding: Nexus Between Civil Rights and the Education Community

OCR does not consider itself an expert on education issues. OCR does not provide formal training to its staff on education issues or on DOEd's programs. Although OCR staff work periodically with external education experts and consultants, OCR does not emphasize the importance of this interaction in its guidance or planning documents. For example, OCR has contracted with the National Science Foundation to develop materials on testing validity. However, OCR has no formal process for encouraging similar collaborations with external education organizations.

Recommendation: Nexus Between Civil Rights and the Education Community

OCR should cultivate relationships with external education experts, teachers, historians, sociologists, economists, and other professionals who can enhance OCR's knowledge of issues affecting education. OCR should recognize the reciprocal relationship between civil rights and education and encourage the incorporation of civil rights principles into the research and activities of educators.

OCR also should establish exchange programs with State and local education agencies, similar to the program operated by the National Science Foundation and participating universities. Through these exchange programs, OCR staff could visit or work in local offices for a short period of time in order to observe the application of OCR's policies in the localities. Moreover, State and local education staff would benefit from observing OCR's operations and from the exchange of expertise and experiences. This exchange also would allow OCR staff to understand education programs and issues that are related closely to civil rights implementation, compliance, and enforcement.

II. National Trends

Finding

In some instances, DOEd data are displayed by students' race or ethnicity in crucial areas, such as demographic characteristics; enrollment of students in particular educational settings (e.g., elementary and secondary school, special education programs, and postsecondary institutions); significant measures of achievement (e.g., test scores on NAEP); and indicators of attainment (e.g., high school completion rates, dropout rates, completion of at least 1 year of college, and attainment of a baccalaureate degree).[14] These presentations of data, however, generally are limited to reporting on students who are white, black, or Hispanic. Data currently are lacking in these critical areas for Asian Americans, Native Americans, and other national origin groups. The Commission made a similar finding in its report, *Civil Rights Issues Facing Asian Americans in the 1990s*. The Commission was concerned that often, available sample sizes of Asian Americans, Native Americans, and other national origin groups are too small to provide information about them.

Accurate, reliable, and complete data on Asian Americans, Native Americans, and other national origin groups are vital for the efforts of the education community to assess the needs of all student subpopulations. The statistics and other information on national origin groups are useful, since they can be used to identify whether there are possible inequities in educational programs or opportunities—a sign that there may be barriers to equal educational opportunity within schools.

Recommendation

OERI documents, and those of other DOEd entities, government agencies, and various research organizations, that contain data utilized by policy and decisionmakers should include information on national origin groups, such as Asian Americans, Native Americans, and others. Data collection should be undertaken by DOEd to enable researchers, policymakers, and other government agencies to evaluate demographic characteristics, educational experiences, measures of educational

[14] *See* chap. 4, tables 4.1, p. 67; 4.2, p. 73; 4.3, p. 76; 4.4, p. 76; 4.5, p. 78; 4.6, p. 79; 4.7, p. 81; 4.23, p. 129; 4.24, p. 131; 4.25, p. 137; 4.26, p. 140; 4.27, p. 142; and 4.28, p. 145.

achievement, and indicators of attainment for Asian American, Native American, and students of other national origins. in cases where data will not be reported, OERI should provide a justification to the researchers.

Finding

OERI reports data on students who are members of language minority groups for characteristics such as the percentages of all such students who speak English well versus with difficulty[15] and the percentages who speak various home languages.[16] OERI also presents data on these students, based on their English speaking ability (well versus with difficulty) for the percentages enrolled in school at various age ranges[17] and the percentages of 16- to 24-year-old students who drop out of school prior to completion.[18] Additional data are reported on the number of students identified as limited English proficient,[19] the percentage of public school students who are limited English proficient,[20] and the native languages spoken by students who are limited English proficient.[21]

OCR, based on provisions of the Title VI statute, *Lau v. Nichols*, and the Equal Educational Opportunity Act, accords civil rights protections *on the basis of their national origin* to students whose primary language is other than English and who, as a result, have difficulties speaking or comprehending English. Under Title VI and the Equal Educational Opportunity Act, these students are entitled to receive special programs and services in order to acquire effective English language skills. Although these protections against discrimination are based on national origin, OERI does not report data by national origin on students who are members of language minority groups or who are classified as limited English proficient.

Recommendation

OERI should collect and report data based on the national origin of students who are limited English proficient in order to more effectively develop and implement educational programs to assist such students in gaining the level of English language proficiency necessary for them to gain meaningful access to an all-English classroom environment.

[15] *See* chap. 4, table 4.15, pp. 109-10.
[16] *See* chap. 4, table 4.16, p. 112.
[17] *See* chap. 4, table 4.21, p. 125.
[18] *See* chap. 4, table 4.22, p. 125.
[19] *See* chap. 4, table 4.17, pp. 115-16.
[20] *See* chap. 4, table 4.18, p. 118.
[21] *See* chap. 4, table 4.19, p. 118.

III. OCR'S Enforcement

Finding: Governmentwide Coordination

Section 504 establishes an Interagency Disability Coordinating Council composed of the heads of several Federal agencies, including the Secretary of Education. The Council is responsible for developing and implementing agreements, policies, and practices designed to (1) maximize effort; (2) promote efficiency; (3) eliminate conflict, competition, duplication, and inconsistencies among the operations, functions, and jurisdictions of various Federal departments, agencies, and branches; and (4) coordinate operations, functions, and jurisdictions of various Federal departments and agencies. It also conducts studies and activities to identify methods for overcoming barriers to the integration of individuals with disabilities into society, and to the independence and productivity of individuals with disabilities.[22]

The Council has served as an active and useful forum for ensuring consistency in the implementation and enforcement of disabilities laws. The Council has held meetings throughout the 1980s and 1990s. It has responded to recent developments in disabilities law, such as the passage of the Americans with Disabilities Act (ADA) in 1990. For example, it permitted agencies to brief the Council on their ADA implementation activities pertaining to regulatory development, technical assistance, and enforcement, and, subsequently, it disseminated to Federal agencies a revised policy statement to assist agencies in understanding their responsibilities under the ADA.[23]

A similar coordination council does not exist, however, for Title VI and Title IX. The basis for a similar coordination council is present in the U.S. Department of Justice's (DOJ) responsibility under Executive Order 12,250 to coordinate Title VI and Title IX enforcement efforts governmentwide.[24]

Recommendation: Governmentwide Coordination

DOEd and OCR, working with DOJ should take a leadership role in establishing similar interagency coordinating councils for the other civil rights statutes enforced by OCR, such as Title VI and Title IX. The civil rights coordinating councils should take an active role in achieving similar goals to those of the current Disabilities Coordinating Council: (1) maximizing effort; (2) promoting efficiency; (3) eliminating conflict,

[22] *See* chap. 5, p. 154.
[23] *See* chap. 5, p. 154.
[24] *See* chap. 5, p. 154.

competition, duplication, and inconsistencies among the operations, functions, and jurisdictions of various Federal departments, agencies, and branches; and (4) coordinating operations, functions, and jurisdictions of various Federal departments and agencies. The councils also should conduct studies and activities to identify methods for overcoming barriers. As an alternative, the existing council should be expanded to include Title VI and Title IX-related activities. This council could then be instrumental in balancing competing interests and sharing ideas, resources, and promising practices.

Finding: Strategic Plan

In 1990, for the first time in its history, OCR developed a National Enforcement Strategy to promote equal educational opportunity for all students. OCR designed the National Enforcement Strategy to enable OCR, which was devoting increasing resources to complaint investigations, to maximize its remaining resources by creating "a comprehensive and well-coordinated program of policy development, staff training, compliance reviews, technical assistance, and policy dissemination."[25] In 1993, OCR replaced the National Enforcement Strategy with the Strategic Plan. DOEd has not incorporated the National Enforcement Strategy or the Strategic Plan into departmentwide activities.

OCR's first goal in its Strategic Plan is to have an "impact on students' lives" by "maximizing the impact of available resources on civil rights in education" and "setting priorities to ensure that OCR addresses the most acute problems of discrimination." To accomplish this goal, OCR has devoted 40 percent of its resources, in the short term, to proactive measures, such as compliance reviews and the provision of technical assistance. In moving resources to proactive measures, OCR balances its complaints workload by focusing proactive resources on students and communities that do not file complaints ordinarily. The plan also requires OCR to recruit and train motivated and able staff, to utilize appropriate technology for survey information and case processing data, to provide access to information for the public, and to promote electronic communications among staff throughout OCR.

In the complaint processing area, OCR's Strategic Plan calls for OCR to improve its complaint processing by providing for "faster, more flexible and less bureaucratic handling of complaint resolution." The plan also declares that "OCR will effect positive change through uniformly strong remedies to civil rights violations." The plan stresses the need for OCR to develop and use "strong remedial models." OCR measures its success with this goal by the number of students it is able to help and by its ability to process complaints without a backlog.

According to the Assistant Secretary for Civil Rights, the Strategic Plan is "a living document that is updated continuously." OCR actively uses the Strategic Plan in the annual enforcement docket process, for budget and resource allocation, for human resources and labor/management issues, and for training. In addition, OCR assesses the impact of the Strategic Plan through information gathered locally.

Recommendation: Strategic Plan

OCR should continue to modify and improve the Strategic Plan as the needs of students change. OCR should work with the other DOEd offices, particularly the program offices, to incorporate the goals of the Strategic Plan or any other operational plan into DOEd's operations.

Finding: Partnership Approach

OCR's Strategic Plan requires OCR to become a partner with local beneficiaries, advocacy groups, and other entities.[26] OCR applies this cooperative approach to resolving both complaints and compliance reviews. Under this approach, when OCR receives a complaint, OCR notifies the school district involved and gives the district an opportunity to work with OCR to resolve the complaint. A similar process occurs with compliance reviews.

Although no formal guidance from OCR headquarters exists on the partnership process--the word "partnership" is not mentioned in OCR's Case Resolution Manual—most regional offices are experimenting with the partnership approach. One of OCR's senior enforcement directors, explained that the partnership approach developed independently within many of the regional offices and, as a result, the approach differs from region to region.

The Kansas City Enforcement Office has formalized its partnership process, entitled Profile, Assessment, and Resolution (PAR) reviews, and issued documents that explain clearly PAR's application to high-priority issue areas. The PAR reviews are intended to replace OCR's traditional compliance review process with a streamlined approach that "recognizes that Federal, state, and local education agencies, as well as parents and other interested parties share a common goal of providing equal

[25] *See* chap. 5, p. 175.

[26] *See* chap. 5, pp. 209-12.

opportunity and access to high-quality education for all students."

A key feature of PAR reviews is that they involve providing school districts with "self-assessment guides" for high-priority issues. School districts complete the self-assessments while the Kansas City regional staff conduct focus group discussions (as opposed to individual interviews) with school district staff, parents, and community members. Based on the self-assessments and the focus group discussions, the Kansas City Enforcement Office provides immediate feedback and recommendations to school district officials. The office also works with State education agency officials to develop statewide strategies.

The Kansas City Enforcement Office developed issue-specific data requests for school districts and issued self-assessment guides for several high-priority issues, including limited English proficiency, overrepresentation of minorities in special education, and equal educational opportunity for minority students in advanced education programs. For each issue area, the office requests basic statistical and procedural information from the school district. The issue-specific guidance provides the school district with information on the criteria that must be met to demonstrate civil rights compliance. The guidance also outlines the application of OCR's legal standards to assessing school districts' education programs. An appendix to the document summarizes statutes and policies related to the issues.

OCR headquarters has not issued formal "partnership practice" guidelines based on the PAR review pilot program developed in Kansas City. Moreover, the PAR review materials are not available through OCR's electronic library.

Recommendation: Partnership Approach

OCR should increase its efforts to disseminate information about partnership practices among its regional staff by issuing formal "partnership practice" guidelines based on the "PAR review" pilot program developed by the Kansas City Enforcement Office. In particular, OCR should finalize and disseminate the PAR review self-assessment surveys to all of the regional offices. OCR should initiate training on the application of partnership principles to the mediation and negotiation of compliance resolutions. OCR should provide specific guidance while also allowing for flexibility to address local issues. OCR also should explain the partnership approach to the public, advocacy groups, State and local education agencies, school districts, teachers, parents, and students, and solicit their participation. OCR should emphasize the importance of working with its customers and stakeholders on their mutual interest in access to a quality education for all students.

Finding: Resources, Staffing, and Workload

As OCR's staff and monetary resources have declined, the office's workload has increased. The number of complaints received annually, after declining in the early 1980s, began an upward trend in fiscal year 1987.[27] With few exceptions, the number of complaints received has continued to grow each year, reaching a high of 5,856 in fiscal year 1995 and projected to reach 6,349 in fiscal year 1996. In the late 1980s, as the number of complaints OCR received grew annually, OCR reduced the number of compliance reviews it initiated. However, beginning in 1991, OCR initiated an increasing number of compliance reviews annually. By fiscal year 1995, OCR initiated 200 compliance reviews.

The burden on OCR's limited resources was further exacerbated by the Government shutdowns in fiscal year 1996. Although OCR is engaged in law enforcement activities, OCR was not exempted from the Government shutdowns and operated under a continuing resolution with a substantially reduced budget of $53 million for part of fiscal year 1996. Assistant Secretary for Civil Rights Norma Cantú has noted that the furloughs of Federal employees resulting from the budget impasses of late 1995 and early 1996 has had a severe negative impact on OCR's ability to implement its mission and responsibilities. For example, OCR was forced to reduce its education and outreach activities and conference travel budgets which are essential to effective prevention of discrimination.

Recommendation: Resources, Staffing, and Workload

The Commission commends OCR on steadily increasing the number of compliance reviews it initiates each year in the face of an increasing complaints workload. Although OCR has maximized its limited resources consistently, there are many issues of importance that OCR cannot address effectively because it does not have sufficient staff or resources. For example, with additional resources, OCR could continue to balance its complaints activities by expanding its proactive activities to include issues such as discrimination in student grading practices and access to career counseling and extracurricular activities.

OCR should conduct a longitudinal civil rights budget impact study to determine the effects of the fiscal year

[27] *See* chap. 5, pp. 183-84.

1996 employee furloughs and budget reductions. The study should evaluate projected costs and benefits over the next 5 years to determine whether OCR will be able to maintain an efficient and effective civil rights program. Because OCR has demonstrated its ability to maximize its limited resources, Congress and the President should increase funding so that OCR may expand its priority issues to accomplish more for civil rights.

Until OCR receives a budget increase, DOEd and OCR should continue to enhance the effectiveness and efficiency of its staff and budgetary resources. For example, DOEd should monitor its decision to reduce OCR's budget and staffing under the National Performance Review. As OCR's budget and staffing continue to decline over the next several years, DOEd and OCR should make quarterly assessments of OCR's civil rights enforcement program to ensure that these reductions do not hamper OCR's ability to ensure compliance with Title VI and other external civil rights statutes. Through these efforts, OCR also can ensure that its complaint workload does not overwhelm its equally important compliance review activities.[28]

Finding: Reorganization

OCR's reorganization, implemented in May 1996, is an efficient and effective structure. As a result of OCR's reorganization, 87 percent of OCR staff in fiscal year 1996 worked outside of headquarters (or in the newly established District of Columbia enforcement office), and virtually all decisions affecting OCR's cases and their resolution were made in the field. OCR's reorganization has the potential for significantly improving the effectiveness with which OCR fulfills its mission and responsibilities.

OCR is relying on the National Performance Review as a "blueprint for a government that works better and costs less." As part of its management reform efforts, OCR has applied the National Performance Review principles of staff empowerment, delayering, and customer orientation to its management initiatives. OCR has created fewer layers of review so that staff in the regions can resolve cases more efficiently.[29] In addition, OCR has redesigned its structure to allow for improved contact between the regional staff and the Assistant Secretary for Civil Rights. OCR's management reforms also have improved OCR's labor-management partnership.

Recommendation: Reorganization

OCR should continue to review and monitor the effectiveness of its reorganization in promoting efficiency and productivity. OCR should survey its staff periodically to ensure continued satisfaction with the current structure and to solicit recommendations for further improvements.

Finding: Team Structure

The Strategic Plan requires OCR to create "Issue Area Teams" at headquarters with substantive expertise in OCR's top priority areas. Under the plan, the issue area teams serve several purposes. They facilitate the development of strong remedial plans; develop and disseminate policy in top priority areas; and develop and disseminate promising education practices that are systemic and designed to prevent discrimination and to promote equal educational opportunity.[30]

The organizational structure of the regional enforcement offices varies. All of the regional offices are organized into teams which conduct complaint investigations, compliance reviews, and other enforcement activities. The teams are led by team leaders and generally consist of attorneys, equal opportunity investigators, and other staff. OCR has placed managers as full members of teams so that the managers can remain in contact with OCR's customers, thus allowing managers to share their expertise with team members and to improve upon it by working directly with the customers.[31]

In some regions, all of the teams have equivalent responsibilities; in others, the teams are specialized. For example, some offices consist of teams divided by enforcement activity, such as complaints resolution or proactive enforcement activities. Each of the teams is headed by a team leader and consists of a senior equal opportunity specialist, investigators, attorneys, and an equal opportunity assistant.

Recommendation: Team Structure

OCR should clearly designate the issue coordinators within headquarters and maintain issue teams. Moreover, OCR should designate staff members in the regional offices who have expertise on specific issues. OCR should convene a task force to review the team structure operations at headquarters and in the regional enforcement offices. The task force should make recommendations to senior headquarters staff on the quality of civil rights implementation, compliance, and enforcement activity in each office. OCR headquarters should then make decisions as to whether the organiza-

[28] *See* chap. 5, pp. 183-84.
[29] *See* chap. 5, p. 188.
[30] *See* chap. 5, p. 188.
[31] *See* chap. 5, p. 189.

tional scheme of each regional enforcement office is conducive to implementing effectively its responsibilities. Where the task force discovers problems, OCR headquarters staff should work with regional staff to recommend changes in the regional enforcement office's organization.

Finding and Recommendation: Regulations

Finding: Definitions

The section 504 regulations provide clarity in defining persons whom the provisions are intended to protect, although the regulations do not reflect current language in the statute. The regulations specify that section 504 protections extend to any "qualified handicapped person," whereas the statutory provisions of section 504 use the phrase "qualified individual with a disability." The section 504 regulations offer a general definition of "qualified handicapped person." Subsections define and provide examples of the elements underlying that general definition, elements such as "physical or mental impairment" and "major life activities." Further, the regulations offer different meanings of the term "qualified" based on specific contexts, such as elementary and secondary education, higher education, or employment.

The Title VI regulations lack clarity on the definitions of the protected classes under the law. The regulations do not define race, color, or national origin. The absence of clear definitions has created implementation, compliance, and enforcement problems, particularly in cases involving students who are members of a national origin minority group, whose primary home language is not English. In addition, since 1990, OCR has placed a high priority on issues related to students whose primary home language is other than English.[32] However, OCR has not published new Title VI regulations or guidelines on compliance issues relating to the development and implementation of educational programs for students who are members of national origin minorities and who have limited English proficiency since a May 1970 policy memorandum published in the Federal Register which the U.S. Supreme Court relied on in its decision in *Lau v. Nichols*.[33] In its policies and case letters, OCR has used the terms "national origin minority," "students whose primary home language is other than English," and "limited-English proficient" without providing clear definitions. Further, the Title VI regulations provide no definitions for these terms, and they offer no criteria for establishing when a student's language needs place him or her among the students *Lau* and the guidelines contained in the May 1970 memorandum intended to benefit. With definitions for these terms in formal regulations, OCR can offer clearer guidance to school districts in identifying students who may need an alternative language education program in order to gain meaningful access to a school's regular education program.

Recommendations: Definitions

To ensure consistency between the law and implementing regulations, OCR should update its section 504 regulations to reflect the current language of the statute. To provide greater clarity in Title VI/*Lau* cases, OCR should provide definitions in the Title VI regulations of terms such as "national origin," "national origin minority," "primary home language is other than English," and "limited English proficient."

Finding: Structure

The section 504 regulations provide a solid foundation for OCR's section 504 program based, in large part, on their specificity. The regulations are subdivided into topic areas: (1) general provisions; (2) employment practices; (3) program accessibility; (4) preschool, elementary, and secondary education; (5) postsecondary education; (6) health, welfare, and social services; and (7) procedures. The appendix to the regulations is similarly subdivided, and it provides specific guidance and clarification on provisions.[34] The Title IX regulations are subdivided in a similar fashion with sections addressing discrimination in admission and recruitment, discrimination in education programs and activities, and discrimination in employment in education programs and activities. Within these sections there are provisions clarifying prohibitions as it applies to elementary and secondary education, higher education, and employment. For example, they address specific topics, such as housing at education institutions, access to public elementary and secondary schools, counseling, financial aid, marital or parental status, athletics, employment criteria, and job classification and structure.[35] For the recipients, beneficiaries, employees, and other individuals affected by federally assisted programs, this specificity assists them in understanding their rights and responsibilities under the Federal regulations.

The Title VI regulations, however, do not contain provisions tailored to different contexts. The regulations offer some context-specific illustrations of prohibited

[32] *See* chap. 5, pp. 196-97.
[33] *See* chap. 5, p. 197.
[34] *See* chap. 5, pp. 191-93.
[35] *See* chap. 5, pp. 191-93.

discriminatory action in, for example, elementary and secondary schools, graduate education, and nonacademic training institutions. Although these examples provide some guidance on Title VI rights and responsibilities, they do not provide the clarity or specificity of the section 504 and Title IX regulations.

OCR staff and officials noted that the general public has little understanding of Title VI in comparison to section 504. OCR officials have stated that because the issues covered under Title VI are more subtle than those under section 504, the public is not as sensitive to them as they are to section 504 issues. Thus, potential complainants are not substantially aware of their rights under Title VI. Section 504 in general, and its regulations in particular, are given much more attention and support than the Title VI regulations.[36]

Recommendation: Structure

OCR should issue new Title VI regulations modeled on the subdivisions in the Title IX and section 504 regulations. OCR should add subparts devoted to elementary and secondary education, higher education, and employment. For example, the subpart on elementary and secondary education should address specific topics, such as educating students who are currently limited-English proficient. The general education subpart should address issues common to elementary and secondary and higher education, such as counseling, racial harassment, and admission to programs. The subpart devoted to higher education should focus on issues such as scholarships and financial aid. In addition, OCR should provide clarification on these topics, where necessary, in an appendix to the Title VI regulations. Such a structure will promote greater understanding of how Title VI applies to specific contexts. From this, recipients, applicants, beneficiaries, and the public generally can gain a clearer understanding of their rights and responsibilities in each of these contexts.

Finding: General Procedures

The section 504 and Title IX regulations contain specific requirements of recipients that have no counterparts in the Title VI regulations. For example, the section 504 and Title IX regulations require all recipients to conduct a self-evaluation to determine their compliance status, and, upon consultation with other individuals, modify their practices and take such remedial actions as necessary.[37] The regulations, however, require only an initial self-evaluation to be conducted within 1 year of the effective date of the regulations. They do not require recipients to conduct continual, periodic self-assessments. Both sets of regulations also require recipients to designate a specific person responsible for compliance with section 504/Title IX, and they provide for notice/dissemination of the nondiscrimination requirements, although under section 504 regulations these requirements apply only to recipients with 15 or more employees.[38]

The section 504 regulations have provisions that are not found in either the Title VI or Title IX regulations. For example, the section 504 regulations require all recipients with 15 or more employees to maintain a list of the persons consulted, and a summary of problems found, modifications made, and remedial steps taken. The regulations also require such recipients to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited.[39]

The Title VI regulations do not contain provisions similar to these found in the section 504 and Title IX regulations. Within OCR's Title VI program, however, at least one OCR regional office has instituted informal self-evaluation practices. OCR's Kansas City Enforcement Office provides school districts with self-assessment guides as part of its compliance review activities. The office permits school districts to complete the self-assessment as it conducts focus group discussions with school district staff, parents, and community members. Based on these self-assessments, the office can then provide immediate feedback and recommendations to school district officials.[40]

Recommendation: General Procedures

OCR should add new provisions to the Title VI regulations requiring all recipients to conduct a self-evaluation to determine their compliance status, and, upon consultation with educational practitioners, parents, and civil rights advocacy groups, modify their practices and take such remedial actions as necessary. The new provisions also should require that all recipients maintain a list of the persons consulted, and a summary of problems found, modifications made, and remedial steps taken.

To promote ongoing assessment of the recipient's compliance status, OCR should add provisions to the section 504, Title VI, and Title IX regulations requiring that recipients conduct self-evaluations on a periodic

[36] *See* chap. 5, pp. 190-96.
[37] *See* chap. 5, pp. 190-96.
[38] *See* chap. 5, pp. 190-96.
[39] *See* chap. 5, pp. 190-96.
[40] *See* chap. 5, pp. 190-96.

basis. OCR should conduct a study to determine a reasonable time-frame within which recipients should conduct their periodic self-assessments and establish a minimum time period requirement. For example, it should specify in the regulations that self-evaluations must occur, at a minimum, every 3 years. To assist in the self-evaluation process, OCR should use the Kansas City Enforcement Office's self-assessment guide as a model to develop formal OCR self-evaluation guides on Title VI, Title IX, and section 504 compliance for school districts. Upon informing recipients of their responsibilities to conduct periodic self-evaluations, OCR should provide them with the self-assessment guides.

OCR also should follow the models in the Title IX and section 504 regulations and add provisions in the Title VI regulations requiring recipients to designate a specific person responsible for compliance with Title VI and to adopt grievance procedures incorporating appropriate due process standards and providing for prompt and equitable resolution of complaints. Such provisions will ensure that recipients have at least one person within their organization or agency knowledgeable of the recipient's Title VI compliance responsibilities and that they have an internal process to refer complainants.

Finding: Provisions on Elementary and Secondary Education

The Title IX and section 504 regulations addressing elementary and secondary education provide much detail on the requirements for ensuring nondiscrimination. The specificity ensures that recipients, applicants, beneficiaries, and the public generally have a solid basis for understanding their Title IX and section 504 rights and responsibilities. The Title IX regulations have specific provisions that relate to elementary and secondary schools and that address particular topics, such as testing, access to course offerings, access to schools operated by local public school systems, and counseling. For example, the Title IX provisions promote equal access to all course offerings regardless of sex, and they provide as specific examples course offerings traditionally subject to gender stereotypes, such as health, physical education, industrial, business, vocational, technical, home economics, and music. The Title IX regulations address the issue of ability grouping in physical education classes and activities only and acknowledge that there is no prohibition on grouping students by ability as long as the students are assessed by objective standards of individual performance without regard to sex.

The section 504 provisions provide greater specificity in that the provisions applicable to preschool, elementary, and secondary education address almost every step in educating students with disabilities. The regulations place responsibility on the recipient to identify and locate all disabled persons who are in the recipient's jurisdiction, eligible by age to be in public education, and not currently receiving a public education. The recipients have an obligation to notify these disabled persons and their parents of the duties specified in the section 504 regulations. The section 504 provisions on elementary and secondary education specify certain procedures that must take place in the referral, evaluation, placement, and reevaluation of persons in special education programs. They also establish a preference for placement of persons with disabilities in regular education programs and for integration with nondisabled persons in academic, nonacademic, and extracurricular activities. OCR staff members note the rationale for many of these provisions is that they promote access for persons with disabilities to the same quality education and options available to nondisabled persons.

The section 504 and Title IX regulations both require a certain minimum threshold of quality in the services, facilities, and resources used in that they must be comparable to the services, facilities, and resources provided to nondisabled persons or students of the other sex. In addition, both regulations have provisions on counseling to prevent the misguidance of students future decisions based on discriminatory advice or assessment.

Because the Title VI regulations are general, they do not contain similar provisions on evaluation and placement of students, testing, comparable facilities and resources, or counseling.[41] OCR has created a draft investigative guidance that addresses issues such as testing and ability grouping;[42] however, OCR has not incorporated any requirements into the Title VI regulations that address these specific topics.

The section 504 regulations are unique in that they prescribe that public elementary and secondary schools must take certain actions to afford qualified persons with disabilities an equal educational opportunity. The regulations provide a broad, substantive right to qualified disabled persons. Public elementary and secondary school systems must provide these persons with a "free appropriate public education," which means that schools must provide qualified disabled persons with an education that meets their individual needs as adequately as nondisabled persons and schools must adhere to certain specific procedures when providing this education. The specificity of those procedures on identification of those in need of education, evaluations, reevaluations,

[41] *See* chap. 5, pp. 190-96.
[42] *See* chap. 5, p. 197.

placements, and counseling give schools step-by-step guidance in understanding their obligations. They also assist students and parents in knowing what to expect from schools. Further, students with disabilities and their parents/guardians also are benefitted by several procedural safeguards. Public elementary and secondary schools must provide students and their parents/guardians with notice of certain actions, an opportunity to examine school records on the student, an opportunity for an impartial hearing if the student/parent/guardian disagrees with the school's action, and a process for reviewing the decision of that hearing.

Neither the Title VI nor Title IX regulations have similar provisions. One area under Title VI that would benefit from specific regulation provisions modeled after the section 504 regulations relates to students who are limited English proficient. OCR's 1991 "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited English Proficiency (LEP students)," outlines specific requirements for Title VI compliance addressing several issues, including staffing requirements for programs aimed at assisting LEP students, criteria for transferring LEP students from language programs to regular educational programs, the necessity for formal LEP identification and assessment procedures, and issues related to the segregation of LEP students and other students. The policy clarifies that students should not be placed in special education programs based on criteria related only to their limited English proficiency and that LEP students should not be excluded from "gifted and talented" programs. The policy, however, offers little guidance on key issues such as identification and assessment of students with limited English proficiency and makes no mention of parental involvement. There are currently no formal regulations that specifically address Title VI compliance for these students.[43] In 1980, OCR sought to issue regulations requiring school districts to follow specific guidelines for Title VI compliance in the development and implementation of education programs for students with limited or no English proficiency. However, OCR officially withdrew the proposed regulations, and it has not attempted to issue new regulations on Title VI compliance under *Lau* since that time.[44]

In addition, OCR staff have offered opinions about whether the Title VI regulations should be revised to make them more similar to the section 504 regulations. According to various staff members, greater specificity would promote a better understanding of Title VI.[45]

Recommendation: Provisions on Elementary and Secondary Education

Although policies and investigative guidance can inform public elementary and secondary schools of the compliance responsibilities, they do not have the force and effect of regulations and are more easily subject to legal challenge. OCR should recognize the importance of formal regulations in outlining Title VI compliance responsibilities. It should publish new Title VI regulations that provide specific provisions related to elementary and secondary education. Using the section 504 and Title IX regulations as a model, OCR should incorporate provisions on topics, such as testing, counseling, comparable facilities and resources, parents' right to due process, access to course offerings, and ability grouping. These provisions would not do away with the need for policy or investigative guidance; however, they would outline the basic requirements necessary in ensuring Title VI compliance in elementary and secondary education for a variety of issues.

Finding: Written Policies and Investigative Guidance Materials

OCR has a strong record for developing section 504 policy and has produced numerous internal section 504 policy memoranda and policy guidance. It also issued an extensive number of section 504 policy letters providing technical assistance and policy clarification to individuals and organizations. Generally, OCR's section 504 policymaking and policy guidance efforts reflect an active response to developing judicial case law and to contemporary issues arising in schools. Its efforts have demonstrated OCR's consistent response in providing section 504 guidance to regional offices as needed.[46]

In addition to its section 504 policies, OCR has issued a number of recent policies and investigative guidance documents relating to the issues focused upon in the Commission's Equal Educational Opportunity Project Series. For example, OCR issued a 1991 "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP students)." This policy provides extensive guidance on Title VI compliance in a number of areas; however, it offers little guidance on key issues, such as identification

[43] *See* chap. 5, p. 197.
[44] *See* chap. 5, p. 197.
[45] *See* chap. 5, pp. 195-96.
[46] *See* chap. 5, pp. 200-01.

and assessment of students with limited English proficiency and parental involvement.[47]

In 1996, OCR issued investigative policy guidance on the subject of minority students in special education. That guidance is useful as it outlines the statistical and analytic procedures necessary for determining whether disproportions in the number of minority students in special education is due to discriminatory action. The guide provides an extensive discussion on the analytic context, data issues, methodology, and statistical tests. It also offers data sheets with instructions on ways to organize and record needed data. The guidance is clear and accurate in recognizing that the misclassification and misplacement of minority students in special education can constitute concurrent violations of Title VI, section 504, and the ADA. The guidance is particularly effective as a self-teaching guide although it should be supplemented with proper staff training.[48]

OCR has issued several other draft investigative guidance materials on issues focused upon in the Commission's project, including draft guidance on ability grouping, underrepresentation of female and minority students in advanced mathematics and science classes, and testing. However, OCR has yet to finalize these materials. The draft guidance on ability grouping discusses legal standards based on caselaw for finding violations of Title VI, but it is outdated. It cites the 1989 U.S. Supreme Court case, *Wards Cove Packing Company v. Atonio*, as authority for the standard of proof in disparate impact cases, when in 1991, the Civil Rights Act reversed the effects of this case.[49] OCR's draft investigative manual on "Underrepresentation of Females and Minorities in Upper-Level Mathematics and Science in Secondary Schools" and its draft investigative guidance on fairness in testing provide comprehensive guidance to investigators in conducting compliance reviews and complaint investigations. Like the guidance provided on minority students in special education, these materials provide enough specific detail on statistical and analytic procedures to serve as self-teaching guides.[50] However, to provide greater context to investigators when using these materials in cases, OCR should provide staff training to accompany the written guidance.

The draft guidance on fairness in testing is detailed. It provides a good discussion on the interaction of civil rights and education standards relating to fairness in testing. For example, it provides investigators with useful instruction in determining that a school relied on valid tests and that it selected and administered tests appropriately. The draft guidance, however, only applies to fairness in testing under Title VI and Title IX.[51] Provisions in the section 504 regulations specifically require that tests be validated and that they be selected and administered appropriately. Title II of the ADA is interpreted consistent with these provisions. Although some case-specific policy guidance has been issued to provide clarifications for determining section 504 and ADA testing standards, OCR has not incorporated section 504 nor the ADA into its fairness in testing guidance.[52] Although OCR has a minority in special education policy recognizing that evaluation practices can constitute concurrent violations of section 504, the ADA, and Title VI, the current draft investigative guidance on testing does not reference this policy, nor does it discuss testing practices in special education evaluation and placement.

Recommendation: Written Policies and Investigative Guidance Materials

OCR should continue its active work in producing section 504 policy guidance and policy letters. It should model its policymaking efforts for Title VI and Title IX after its section 504 program. OCR should maintain a continuing effort to remain aware of the major judicial cases and education issues arising on Title VI and Title IX, and it should make every effort to produce policy guidance or clarification where necessary. OCR also should survey advocacy groups, customers, and stakeholders periodically to identify areas of concern that may require policy guidance from OCR. OCR should publish new Title VI policy guidance specifically addressing the legal obligations of schools toward students who are members of national origin minorities and who have limited English proficiency. This policy should offer detailed guidance to OCR staff and school districts on such issues as parental involvement and notification, the definition of "limited English proficiency," and identification and assessment procedures.

OCR should issue finalized investigative guidance on fairness in testing. OCR should modify the draft to include a discussion of the legal standards and investigative guidance on testing under section 504 and Title II of the ADA. To provide clearer guidance on testing issues that relate to special education evaluation and placement, OCR should clarify the legal standards for determining that a testing practice violates Title VI only,

[47] *See* chap. 5, pp. 202-03.
[48] *See* chap. 5, pp. 201-02.
[49] *See* chap. 5, p. 202.
[50] *See* chap. 5, p. 203.
[51] *See* chap. 5, p. 203.
[52] *See* chap. 5, p. 204.

section 504 and the ADA only, or Title VI, section 504, and the ADA concurrently. To assist its investigators in understanding testing practices in special education evaluation and placement, OCR should incorporate examples of fact scenarios in the testing guidance. The examples should outline circumstances for finding a violation of Title VI only, section 504 and the ADA only, or Title VI, section 504, and the ADA concurrently. OCR also should reference its policy on minority students in special education so that investigators are informed of other supplemental resources on this issue.

Finding: Policy Dissemination and Electronic Policy Databases

An effective way to promote compliance with civil rights laws is through dissemination of, and education on, the criteria considered by OCR in an investigation or compliance review.[53] Recipients who understand the actions that constitute discrimination and OCR's criteria for civil rights compliance will be better informed to ensure that their programs comply with civil rights laws. Recognizing the importance of this information, OCR has begun to share its investigative guidance with the public so that they may be knowledgeable about OCR's "rules" and requirements.[54] OCR has shared this guidance when conducting complaint investigations and compliance reviews and when providing technical assistance. OCR also has collected its policies and resource guidance materials into its electronic library. As a result, OCR's policies, resource materials, education and technical assistance documents, and other information are easily accessible through a single computerized database. This database, however, is not currently accessible to the public.[55]

Recommendation: Policy Dissemination and Electronic Policy Databases

OCR should continue its practice of sharing its investigative guidance with the public. It should continue to provide this information to recipients during its complaint investigations, compliance reviews, and technical assistance activities. It also should ensure that the public has continual access to this information. OCR should take advantage of its computer database collection of information. It should make its policies, investigative guidance, and other education and technical assistance materials available to the public through an electronic bulletin board service or through the World Wide Web. In addition, OCR should provide the public with an electronic forum, newsgroup, or electronic mail address to post questions or requests for information. This use of computer technology allows OCR not only to provide information to the public, but also to receive information that may reveal new areas of public concern that OCR may need to address.

Finding: Case Resolution Manual

The Case Resolution Manual has improved OCR's method of investigating and resolving complaints.[56] It has moved OCR's case resolutions from a formalized process involving several layers of review to a streamlined and flexible method. For example, the new procedures provide staff the flexibility to take whatever action is necessary to resolve each complaint. If at any point the case can be resolved, the complaint resolution team has the authority to resolve it. For example, early complaint resolution, in which OCR acts as a mediator to facilitate agreements between parties, can occur at any time during the complaint process.[57] OCR no longer limits mediation to the period prior to OCR's investigation of the complaint. The team structure, which combines the traditional supervisory and nonsupervisory staff members, permits team members to make case decisions at one time and avoids time delays involved with layered reviews and supervisory decisionmaking. Based on the Complaint Resolution Manual's more flexible approach and team-based decisionmaking, OCR has been able to conserve resources on complaints and expand resources allocated to compliance reviews and proactive activities. For example, the Chicago office now is able to spend approximately 45 percent of its staff resources on compliance reviews and proactive activities, in comparison to at most 10 to 15 percent of its resources prior to the issuance of the Case Resolution Manual.[58]

Overall, the Case Resolution Manual has led to positive changes in OCR's case resolution process. OCR has provided staff training on team building, and it has incorporated a monitoring event system into its case information system, CIS-II.[59]

Recommendation: Case Resolution Manual

OCR should continue to rely on its Case Resolution Manual for conducting complaint investigations and compliance reviews. However, OCR should monitor the

[53] *See* chap. 5, p. 205.
[54] *See* chap. 5, p. 205.
[55] *See* chap. 5, p. 205.
[56] *See* chap. 5, pp. 206–07.
[57] *See* chap. 5, p. 206.
[58] *See* chap. 5, p. 207.
[59] *See* chap. 5, p. 207.

case resolution process to ensure that quality in case resolutions is not compromised. To ensure that the less formal case resolution process does not permit schools to neglect their commitments and obligations, OCR should ensure that an effective monitoring system is in place to follow-up on cases after they are resolved. To support the monitoring function, OCR should provide a stronger section in the Case Resolution Manual on monitoring procedures. This section should formalize staff monitoring procedures both before and after OCR has reached agreement with a school district. The section should also place particular emphasis on cases where OCR has met with continued resistance from a school district in fulfilling its legal obligations. In addition, this section should contain examples of new and innovative monitoring activities conducted in the regional offices.

OCR also should ensure that staff obtain training in the skills necessary to utilize the case resolution process effectively. To ensure that quality is not compromised for improvements in efficiency, OCR should provide sufficient staff training in skills, such as mediation and negotiations, and continue its training on team-based decisionmaking.

Finding: Compliance Review Site Selection

In selecting districts for compliance reviews, OCR no longer selects districts randomly, nor does it select districts based solely on a statistical analysis of data collected by OCR. Staff collect information from a variety of sources and usually seek input from stakeholders, such as advocacy groups, media, and parents. OCR seeks input from State education agencies to identify school districts that are not in compliance or that may have potential compliance problems. OCR's priority is to select compliance review sites that will have the greatest impact on students.[60] One OCR regional director explained that OCR considers a variety of factors when identifying school districts for proactive enforcement activities, such as the demographics of the school system. In 1986 and 1987, OCR issued policy guidance for the selection of sites for compliance reviews based on the *Adams* court order. However, this document no longer represents OCR's current policy and is considered a historical policy.[61] To date, OCR has not provided any formal guidance to its regional staff establishing OCR's current priorities for compliance review site selection.

Recommendation: Compliance Review Site Selection

The Commission encourages OCR to expand its selection process for compliance reviews to include more input from parents and students. OCR regional staff should host town meetings with advance notice, and times and locations to attract the largest number of parents. OCR should encourage all parents to attend the meetings and voice their concerns. These meetings will provide OCR with essential input that will assist its staff in selecting compliance review sites that will have the greatest impact on students.

Finding: Model Investigative Plans

Some of OCR's enforcement offices have created model investigative plans for a number of issue areas.[62] Complaint and compliance review teams use these model plans as guides to develop their investigative approaches to individual cases in these issue areas. The Atlanta Enforcement Office provided a copy of its model investigative plans for Title VI gifted and talented reviews, and the Philadelphia Enforcement Office provided a copy of its model investigative plan for ability grouping compliance reviews. These plans are comprehensive and provide sufficient information to guide investigators during issue-specific investigations and compliance analyses.[63] For example, the Atlanta office's model gifted and talented plan includes information on jurisdiction, the legal authority for the investigation, and background facts. It includes approaches for resolving issues, such as the analysis of racial and ethnic data on student representation in gifted and talented programs and the evaluation of screening, referral, and placement procedures. The plan also specifies the types of data and analysis required to complete an investigation and a list of the types of witnesses who should be interviewed. The Philadelphia office's plan on ability grouping is similar and it also includes a preface discussing principles that investigators should utilize during investigations. The plans, however, only discuss investigations at the factfinding and analysis stages. They do not cover issues, such as negotiations and remedies.[64]

Recommendation: Model Investigative Plans

Using the enforcement offices' model plans as guides, OCR should issue formal model plans for each of its

[60] *See* chap. 5, p. 208.
[61] *See* chap. 5, p. 209.
[62] *See* chap. 5, p. 212.
[63] *See* chap. 5, p. 212.
[64] *See* chap. 5, p. 212.

priority issues. OCR should identify experts or expert teams among staff in headquarters and the enforcement offices who should jointly serve as task forces on specific issues. These task forces can then develop the formal model investigation plans that will complement the investigative guidance and policy materials. The investigative plans should apply the legal theories and policies to actual situations and provide a step-by-step operating plan for OCR's regional compliance teams. OCR should incorporate not only factfinding and analysis information into the plans, but also guidance for negotiating corrective actions and developing remedies. OCR should offer the formal model plans as guides to ensure uniformity among regional enforcement offices, while still permitting the enforcement offices flexibility to adjust to unique situations. As with OCR's policies and investigative guidance, its model plans should be available to the public for the purposes of explaining OCR's rules and its approaches to proving discrimination. OCR should add these investigative plans to its electronic library to ensure that its collection of resource guidance materials is complete.

Finding: Technical Assistance and Outreach and Education

Outreach and education and technical assistance are essential components of an effective civil rights enforcement program.[65] With OCR's renewed emphasis, under its Strategic Plan, on proactive activities, OCR has incorporated outreach and education and technical assistance as essential ingredients in its compliance reviews. However, OCR's regional enforcement offices have reduced the delivery of technical assistance and outreach and education services that are not part of a compliance review. OCR relies primarily on its program legal staff to develop these materials. Moreover, OCR has not allocated adequate staff to this important task.[66]

Technical assistance and outreach and education are essential elements in the prevention and elimination of discrimination. According to OCR's regional staff, the public is not familiar with the provisions of Title VI in part because of OCR's reduced outreach activities. Staff in several regional offices indicated that their offices are not initiating as much technical assistance as they previously did because of resource constraints and a growing workload. Furthermore, the uncertain budgetary environment in fiscal year 1996 prevented the office from planning technical assistance activities. Assistant Secretary Cantú confirmed that decreases in OCR's budget limited its ability to conduct outreach and education, and technical assistance activities.

One of OCR's primary technical assistance activities is the development and dissemination of "models that work" and "promising programs and practices" documents in its high-priority areas.[67] The "promising practices" documents describe educationally valid models that have been implemented in school districts across the country and that promote equal educational opportunity in the issue areas. The "promising practices" documents are distributed to school districts as part of OCR's technical assistance efforts, and also are used as guides in developing remedial plans for school districts that are not in compliance with civil rights statutes. OCR uses "promising practices" and "models that work" to provide districts with information on implementing educationally sound programs.

In March 1996, OCR released a promising practices document relating to equal educational opportunity for students with limited English proficiency. The document describes a number of educational programs that may help schools ensure effective participation by limited-English-proficient students in their regular education programs. For each education program, the document indicates the targeted population, provides a brief summary description, offers evidence of the program's success, and gives the names of contact persons familiar with the program.

In April 1996, OCR released a "promising practices" document entitled "Access for Women and Minorities to Mathematics and Science Programs and Gifted and Talented Education Programs." The document identifies the promising programs' target groups and goals, provides brief descriptions of promising programs, gives evidence of success, and identifies contact persons. In preparing this document and in ongoing work in the area of underrepresentation of women and minorities in higher level mathematics and science courses, OCR has worked with OERI's Eisenhower Mathematics Consortium, which has expertise on new and nontraditional techniques for teaching mathematics and science so as to reach students who traditionally have not participated in higher level courses in these subjects.

OCR also has teams working on promising practices documents in the areas of ability grouping and overrepresentation of minorities in special education. OCR is participating in Project Forum, a project funded by the Office of Special Education Programs and operated under the auspices of the National Association of State Directors of Special Education. The project is

[65] *See* chap. 5, p. 213.

[66] *See* chap. 5, p. 213.

[67] *See* chap. 5, p. 213.

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designed to develop promising practices to reduce the number of minority children referred for special education. OCR expected to release a "resource guide" that would describe some promising practices in this area and identify educational experts on various alternative strategies in June 1996.

Recommendation: Technical Assistance and Outreach and Education

To emphasize the importance of technical assistance as a preventive tool, OCR should ensure that it has sufficient staff and resources to develop technical assistance materials.[68] To create effective "promising practices" and "models that work," OCR should expand the disciplines of the team members assigned to develop these materials. For example, OCR should include educators, economists, and sociologists, as well as attorneys and civil rights experts, on their development teams to ensure the development of practices that are sound on a variety of levels. OCR should take greater advantage of the resources and staff available throughout DOEd to assist in the development of materials designed to promote equal educational opportunity for all students. OCR should issue "promising practices" in all of its priority issue areas as formal technical assistance documents.

Finding: Staff Training

OCR's efforts to provide staff training reflect an active effort to respond to evolving needs.[69] For example, OCR has provided training to accompany OCR's goals and accomplishments for implementing the Strategic Plan. As OCR has moved to a team-based structure, it has provided staff with cross-service team building training. As it has established more user-friendly computer services, staff access to the case system database (CIS-II), the electronic library, and electronic mail has increased, and OCR has provided staff with computer training to accompany the technological changes and the increasing reliance on computer technology. OCR has provided this type of standard skills training primarily under contract with private companies and organizations.[70]

OCR has provided its staff training on topics, such as the Case Resolution Manual, priority issue areas, investigative guidance, and policies, primarily through in-house training sessions and telephone conferences.[71] OCR also has allowed staff to attend training conferences held by public interest organizations.[72] Of the priority target areas, OCR has been most active in providing training on *Lau* issues. For example, over the last few years, staff members in OCR's San Francisco and Denver Enforcement Offices have provided telephone conference training on the education of students who have limited English proficiency. On other issues, such as within-school grouping practices, OCR has provided in-house training on its "Minority Students in Special Education" policy. The training provided on other substantive policy issues, however, has been more limited.[73]

In recent years, OCR has produced a number of finalized and draft versions of investigative guidance.[74] They address topics, such as ability grouping, minority students in special education, fairness in testing, and underrepresentation of female and minority students in advanced mathematics and science classes. Although these materials provide enough detail to serve as self-teaching guides for OCR's investigators, they are not sufficient to provide staff members with practical knowledge on the application of investigative methods, analyses for finding discrimination, negotiating strategies, and effective remedies.[75] The Commission's interviews with OCR's regional staff indicate that OCR's staff requires more training on the application of OCR's detailed policies to actual cases.[76]

OCR has had opportunities to receive training on topics that supplement their knowledge of civil rights. For example, OERI offered to provide OCR staff with training on education models and practices. However, OCR has not yet accepted OERI's offer.[77]

Recommendation: Staff Training

OCR should continue to provide its staff with training on standard skills, such as management training, team-based training, and computer skills. It should use its training efforts on *Lau* issues as a model to establish teams of experts for various issues areas that will provide telephone or location training for OCR staff. OCR should provide training regularly on its substantive issues, particularly its priority issues, such as *Lau* issues, ability grouping issues, section 504 disabilities issues, and gender issues relating to academics. OCR also should develop extensive training programs to supplement its investigative guidance materials. It should ensure that each staff member involved in the investigations or

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[68] *See* chap. 5, pp. 213-14.
[69] *See* chap. 5, p. 214.
[70] *See* chap. 5, p. 214.
[71] *See* chap. 5, p. 214.
[72] *See* chap. 5, p. 214.
[73] *See* chap. 5, p. 214.
[74] *See* chap. 5, p. 214.
[75] *See* chap. 5, p. 214.
[76] *See* chap. 5, p. 215.
[77] *See* chap. 5, p. 215.

compliance review process understands the information required for effective factfinding, the analyses needed for findings of discrimination, and effective negotiating and corrective action strategies. To assist staff in receiving ongoing training, OCR should provide training in computer applications. For example, training in applications can assist staff in using statistical software applications and allow them to work with the software on their personal computers.

In addition to providing training on standard work skills and priority target issues, OCR should provide its staff with training on multidisciplinary subjects. For example, since statistical analysis is a fundamental aspect of disparate impact analysis, OCR should offer training in statistics. OCR also should offer training or training materials on basic education topics, such as special education, ability grouping, and education programs to assist students with limited English proficiency. Such training will assist staff in understanding the programs analyzed in their complaint investigations and compliance reviews. It also will assist staff in identifying problems associated with discrimination and designing effective solutions. For example, since knowledge of effective education models and practices are useful in developing corrective action plans and remedies, OCR should provide some training on education practices.

To fully develop staff skills and ensure effective application of OCR's policies, OCR should incorporate hands-on training techniques and mock investigations into its staff training activities. This will allow OCR staff to understand the mechanics and logistics of conducting investigations and provide an opportunity to develop troubleshooting skills.

To assist OCR in providing training on educational issues, OCR should work with the program offices to share resources and materials and to identify contractors to provide this training. OCR also should accept OERI's offer to provide training and work with OERI to develop an ongoing training program on education issues and practices. OCR also should continue to incorporate staff training into its budget process to ensure sufficient funding. To maximize its training budget, OCR should conduct a study to determine the most efficient training methods for its staff.

Finding: Use of Computer Technology

OCR utilizes computer technology to enhance its implementation, compliance, and enforcement responsibilities.[78] For example, since 1982, OCR has maintained its complaints and compliance review data on computer database systems. OCR's Case Information System for Windows (CIS II), the system OCR uses to maintain current case data, includes a monitoring event system which enables OCR staff to track and update monitoring activities more easily. The system allows OCR staff to identify a case or set of cases by a number of fields, for example, by docket number, date, region, recipient name, issue, jurisdiction, and basis. It allows OCR to compile reports on its workload with greater ease and efficiency. In addition, it permits OCR staff to identify and view the status of cases efficiently.[79] In addition to its complaints and compliance review database system, OCR has established electronic communication among its headquarters and regional staffs. Its electronic mail system also allows OCR staff to communicate with external agencies and the public generally.[80] OCR also has codified into a computerized "Policy Codification System" its policy memoranda, policy letters, and letters of finding that describe new policies. The policy codification system is part of OCR's larger electronic library that OCR created to facilitate document management and promote internal access to information.

OCR's electronic library is a comprehensive system containing collections of documents, including OCR's case letters; its resource guide materials; its current and historical policies; reports, speeches, and testimony of OCR and of all relevant Federal agencies that influence OCR's work; the texts of Federal and State statutes and regulations relating to civil rights in education; investigative materials, such as OCR's Case Resolution Manual, a list of school districts under Federal court desegregation orders, and forms and sample letters that OCR's staff members can use as models in performing their work; and technical assistance materials and publications. The electronic library contains not only materials produced by OCR, but also materials produced through DOEd's program offices that are helpful to OCR's work. For example, the resource guide collection includes a report prepared for the Office of Special Education Programs within OSERS on the overrepresentation of minority students in special education.[81] Each regional/enforcement office is equipped with at least one personal computer that provides access to OCR's electronic library. However, OCR has not made the electronic library available to the public.[82]

[78] *See* chap. 5, p. 215.

[79] *See* chap. 5, p. 215.
[80] *See* chap. 5, p. 215.
[81] *See* chap. 5, p. 215.
[82] *See* chap. 5, p. 215.

Overall, OCR has made efficient use of computer technology. Its CIS II database and electronic library are user-friendly systems.[83] These systems, and OCR's electronic mail system, have promoted greater interaction among regional enforcement offices and between the regional offices and headquarters. It has provided staff members with improved access to the resources that supplement their knowledge and improve their ability to conduct their work. For example, with agencywide access to case letters, resource guide materials, and technical assistance documents, OCR staff have models to develop better case strategies, remedies, outreach programs, and technical assistance activities.[84]

Recommendation: Use of Computer Technology

Although OCR has equipped each regional enforcement office with at least one personal computer providing access to the electronic library, it should invest in the resources necessary to make the electronic library available to more staff members. In addition, OCR should open its electronic library to the public. It should develop a network to make the electronic library accessible to the public similar to the access OERI has provided for the ERIC database,[85] and it should advertise the electronic library's availability. To ensure that OCR staff and the public generally are well informed of the relationship between civil rights and education practices, OCR should continue to work in coordination with the program offices and OERI to maintain education information useful for civil rights enforcement. For example, as program offices, such as OSERS, OESE, and OBEMLA, develop technical assistance materials or reports on promising practices or education models that work, OCR should make these materials available to OCR staff through the electronic library. Staff and appropriate technical support will be necessary to maintain the electronic library as effective research tools and information clearinghouses. OCR should dedicate sufficient resources to continuously update and maintain its databases and its electronic communication system.

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[83] *See* chap. 5, p. 216.
[84] *See* chap. 5, p. 216.
[85] *See* chap. 5, p. 215.